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In The

Supreme Court of the United States

CHECK INVESTORS, INC.,
CHECK ENFORCEMENT, INC., JAREDCO, INC.,
and BARRY S. SUSSMAN,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN ROBERT LACHEEN
ANNE M. DIXON
LACHEEN DIXON WITTELS
& GREENBERG, LLP
1429 Walnut Street, 13th Fl.
Philadelphia, PA 19102

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, the terms "creditor" and "debt collector" are defined so as to be mutually exclusive. Is an outright purchaser of bad checks that were previously deemed uncollectible subject to the FDCPA's restrictions applicable to "debt collectors" when the purchaser attempts aggressively to collect on those instruments for its own account?

2. When the Federal Trade Commission sues in federal district court for an injunction against alleged violations of the FDCPA as "unfair trade practices" under 15 U.S.C. §§ 53(b), 1692*l*(a):

(a) Does any statute authorize the FTC to sue for equitable monetary relief in the nature of restitution or disgorgement?

(b) Does the term "consumer" as used in the FTC Act – which has no applicable statutory definition – include a delinquent drawer-obligor on a negotiable instrument, or is that term used in its ordinary sense?

(c) Is the FTC subject when it sues to the limitation imposed by Congress in 1994, *id.* § 45(n), that the "Commission shall have no authority under this section . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably

QUESTIONS PRESENTED – Continued

avoidable by consumers themselves and not outweighed by countervailing benefits to consumers"?

3. When the FTC sues for an injunction and "equitable monetary relief" against violations of the FDCPA, does the district court have authority to grant an award of "restitution" or "disgorgement" for violations of the Act extending back in time up to ten years, where "jurisdiction" under the FDCPA, 15 U.S.C. § 1692k(d), is limited to actions brought "within one year from the date on which the violation occurs"?

LIST OF ALL PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption of the case in this Court contains the names of all parties (petitioners Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., and Barry S. Sussman and respondent Federal Trade Commission, an agency of the United States). A co-defendant in the district court, and consolidated appellant in the court of appeals, Charles T. Hutchins, has petitioned this Court separately. Petitioners know of no other related cases which are pending in any court.

The three corporate petitioners are not publicly traded. They have no parent corporations, and no corporation owns more than 10% of the stock in any of them.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., and Barry S. Sussman jointly petition this Court for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Third Circuit filed on September 6, 2007, affirming the district court's summary judgment and final injunction against the petitioners entered at the behest of the Federal Trade Commission.

OPINIONS BELOW

The Third Circuit's precedential Opinion (per McKee, J., with Ambro & Nygaard, JJ.), affirming the judgment entered against petitioners in a civil enforcement action brought in the District of New Jersey by the Federal Trade Commission, was filed on September 6, 2007. See *Federal Trade Comm'n v. Check Investors, Inc.*, 502 F.3d 159; Appx. 1-34. The opinion of the district court (Bissell, J.), dated July 15 and filed July 18, 2005, is not published, but is available *sub nom. Federal Trade Comm'n v. Check Enforcement*, 2005 WL 1677480; Appx. 35.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the district court's summary judgment and final injunction against the petitioners was filed on September 6, 2007. A copy is Appendix 1. Their petition for rehearing was denied by Order dated February 6, 2008. The court of appeals filed separate orders as to panel rehearing and rehearing *en banc*; a copy of each begins at Appendix 82. On April 24, 2008, under No. 07A855, Justice Souter extended the time to and including July 5, 2008, for the filing of this petition. The petition is being filed by commercial carrier on or before the first business day thereafter. Rules 13.1, 13.3, 13.5. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTES INVOLVED

The Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, provides, in pertinent part:

> **§ 45. Unfair methods of competition unlawful; prevention by Commission**
>
> **(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade**
>
> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, [inapplicable exceptions omitted] . . . , from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

* * *

(m) **Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure**

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

* * *

(n) **Standard of proof; public policy considerations**

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

§ 53. False advertisements; injunctions and restraining orders

* * *

(b) **Temporary restraining orders; preliminary injunctions**

Whenever the Commission has reason to believe –

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public –
>
> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. * * *

The Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, provides, in pertinent part:

> **§ 1692a. Definitions**
>
> As used in this subchapter –

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the

exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include –

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any

other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity

(i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;

(ii) concerns a debt which was originated by such person;

(iii) concerns a debt which was not in default at the time it was obtained by such person; or

(iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term "State" means any State, territory, or possession of the United States, the

District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

§ 1692k. Civil liability

(a) **Amount of damages**

Except as otherwise provided by this section, any debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of –

(1) any actual damage sustained by such person as a result of such failure;

(2) (A) in the case of any action by an individual, * * * ; or

(B) in the case of a class action, * * * ; and

(3) in the case of any successful action to enforce the foregoing liability, * * *

(b) **Factors considered by court**

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, * * *

(c) **Intent**

A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error

notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) **Jurisdiction**

An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

(e) **Advisory opinions of Commission**

No provision of this section imposing any liability shall apply to any act done or omitted in good faith in conformity with any advisory opinion of the Commission, notwithstanding that after such act or omission has occurred, such opinion is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

§ 1692l. Administrative enforcement

(a) **Federal Trade Commission**

Compliance with this subchapter shall be enforced by the Commission, except to the extent that enforcement of the requirements imposed under this subchapter is specifically committed to another agency under subsection (b) of this section. For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act [15 U.S.C. 41 et seq.], a violation of this

subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

(b) **Applicable provisions of law**

* * *

(d) **Rules and regulations**

Neither the Commission nor any other agency referred to in subsection (b) of this section may promulgate trade regulation rules or other regulations with respect to the collection of debts by debt collectors as defined in this subchapter.

STATEMENT OF THE CASE

This petition arises out of a civil suit by the Federal Trade Commission ("FTC") for equitable relief against petitioners to prevent them from pursuing payment on bad checks they had purchased after the checks had been deemed uncollectible by others.

The Third Circuit held that petitioners were acting as "debt collectors" under federal consumer law and on that basis upheld a permanent injunction and $10.2 million in equitable monetary relief.

a. Procedural History

The FTC brought a civil action in the United States District Court for the District of New Jersey pursuant to 15 U.S.C. §§ 45(m), 53(b) and 1692*l*(a),[1] seeking to enjoin what the Commission claimed were unfair trade practices under the Trade Commission Act and violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* The district court granted a preliminary injunction and then, on cross-motions for summary judgment, a permanent injunction. Petitioners contended in the district court and on appeal, *inter alia*, that they are not "debt collectors" within the meaning of the FDCPA and that their business does not affect "consumers" and so does not fall within the purview of the Federal Trade Commission Act ("FTCA").

On cross-motions for summary judgment, the district court entered a permanent injunction against the petitioners and assessed a civil penalty of over $10.2 million in "equitable monetary relief," payable to the respondent FTC. Appx. 35-58 (opinion), 59-81

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[1] See Statutes Involved *ante*.

(injunction).[2] On appeal, petitioners pursued their contention that they are not subject to the laws invoked against them, premised on careful construction of the governing federal statutes. The Third Circuit, after hearing argument and having the matter under advisement for nearly a year, affirmed in a lengthy opinion filed September 6, 2007, which acknowledges the difficulty and importance of the questions involved. App. 1-34. The Circuit's decision substitutes an obviously strong disapproval of the petitioners' business methods for analysis of the statutory language of the FDCPA, and in the case of the Federal Trade Commission Act overlooks the controlling provision entirely. Rehearing was denied. App. 82-85.

b. Statement of Facts

Petitioners were in the business of buying the rights to collect on bad checks which had originally

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[2] The district court referred to the $10.2 million judgment as "restitution," App. 58, 60, and as "equitable monetary relief." App. 69. The opinion of the court below refers to that award one time as "fines," App. 2 (502 F.3d at 162), and elsewhere as "restitution," App. 8, 10 (502 F.3d at 165). Under the terms of the injunction, however, to the extent that the FTC could not return the money to affected consumers, it was authorized to keep the balance on a theory of "disgorgement," App. 69, even though the amount "may exceed [petitioners'] unjust enrichment." App. 61. Under the terms of the injunction, petitioners were barred from challenging the FTC's application of the funds. App. 69-70.

been written for various retail transactions. To persuade the writers of these checks to make good on their long-ignored promises to pay, petitioners and their employees engaged in aggressive methods and tactics which are prohibited by federal law when engaged in by professional debt collectors. The case was decided on summary judgment; the district court's findings are in App. 36-44, 55-57, and summarized by the court of appeals at App. 2-7.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court for the District of New Jersey had subject matter jurisdiction of this case under 15 U.S.C. §§ 53(b), 1692k(d) and 28 U.S.C. § 1345 (U.S. agency plaintiff). The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1. **In order better to achieve, in its view, the remedial purposes of the Fair Debt Collection Practices Act, but in conflict with this Court's precedent, the decision of the court below explicitly disavows plain language statutory construction of the mutually exclusive terms "creditor" and "debt collector."**

A dispassionate and careful reading of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), demonstrates that the legal position taken by petitioners throughout this litigation is

correct. Because petitioners are the full owners of the checks on which they attempt to collect, they are "creditors" as defined in 15 U.S.C. § 1692a(4) and do not come within the mutually exclusive definition of "debt collector," as set forth in *id.* § 1692a(6). The court below nevertheless upheld a penalty of more than $10 million against them, because their conduct seemed to that panel to be more like that of a debt collector than of a creditor. This Court should grant the writ to enforce its uniform teaching that federal statutes cannot and must not be construed in this manner, to elevate judges' views of public policy over the precise and nuanced language utilized by Congress to achieve its purposes.

The decision below upholds application of the FDCPA to the appellants on the basis that their relationship to the debtors is more like that of a third party debt collector than it is like that of a traditional retail creditor. App. 30-33 (502 F.3d at 172-74). To hold otherwise, suggests the court of appeals, would "elevate form over substance and weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation." App. 28 (502 F.3d at 172-73). The panel therefore contends that petitioners' plain language argument, while "rather clever, . . . is wrong." App. 28 (502 F.3d at 172). A close reading of the statutory language, however – a reading which insists on assigning meaning to every word and phrase – is not to be disparaged as merely "clever"; moreover, it cannot be "wrong" because it fails to

meet some other, non-statutory test developed by judges. Thus, petitioners' argument does not merely "appear" to be valid "at first blush," *id.*, it is plainly correct. What "is wrong," *id.*, is the lower courts' allowing the FTC to "enforce" a law that Congress never passed.

As the opinion of the court below recognizes, a "debt collector," as defined in the FDCPA (with immaterial exceptions), is someone who "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." App. 29 (502 F.3d at 171), *quoting* 15 U.S.C. § 1692a(6); *see also* Statutes Involved *ante*. The debts at issue here, having been fully acquired by the petitioners, were no longer owed or due to "another." A "creditor," on the other hand, is defined, in pertinent part, as someone "to whom a debt is owed. . . ." App. 28 (502 F.3d at 171), *quoting id.* § 1692a(4). Once they fully acquired all rights in the checks that others had deemed uncollectible, petitioners never sought to collect any debt owed (or asserted to be owed) to "another." Instead, they themselves were the ones to whom the "debt [was] owed" at the time of collection. The petitioners, at all pertinent times, were thus "creditors" not "debt collectors" under the FDCPA.

It is true that the statutory term "creditor," as defined, "does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." *Id.* But even accepting for

purposes of argument that when petitioners purchased the checks at issue they did acquire an "assignment" of "debts" that were already "in default," as the court below holds, App. 29-31 (502 F.3d at 167-71), they did not have the purpose thereafter – much less the "sole" purpose – to attempt "collection of such debt[s] *for another*." Rather, they had acquired full ownership of the defaulted debts as receivable assets for their own account. The prior owner of these debts had no further interest in them at all. Hence, the petitioners *never* had any intent to collect any debts "for another." The plain language of the statute thus fully and strongly supports petitioners' position in this case.

The court below essentially conceded its stratagem, agreeing that "nominally" petitioners were apparently right. By the pejorative "nominally," the court seemed to mean "under the applicable statutory definition":

> Admittedly, focusing on the status of the debt when it is was acquired overlooks the fact that the person engaging in the collection activity may actually be owed the debt and is, there, at least nominally a creditor.

App. 30. Nevertheless, suggested the court of appeals, "Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA." *Id.* But as the statutory language shows, this is true only in part. The theory of the court below, in order to thwart the tactics used by

petitioners of which the judges disapproved, would deny petitioners their proper status as "creditors," by impermissibly reading the words "for another" entirely out of the statutory definition of "debt collector."

If there were an ambiguity in the statutory language, the panel's purpose-centered approach might have merit. But there is not. A third party is not a "debt collector," no matter whether the debt was or was not "in default" when assigned, unless that person seeks to collect a debt owed to or due "another," and is not excluded from the definition of "creditor" unless he or she seeks to collect the debt "for another." This bright line distinction has not escaped at least some other courts of appeals. See *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106-07 (6th Cir. 1996). Most important, the construction of the court below defies this Court's consistent teaching: Plain language of a statute is the "starting place in our inquiry." *Staples v. United States*, 511 U.S. 600, 605 (1994). When the language is clear, even when the agency assigned to enforce the law disagrees, the text of a statute is "the end of the matter." *Lopez v. Davis*, 531 U.S. 230, 247 (2001). This is equally, if not especially true of statutory definitions. *Burgess v. United States*, 553 U.S. —, 128 S.Ct. 1572, 1577 (2008). The Court has applied this approach to both the Federal Trade Commission in its enforcement of the FTC Act, see *California Dental Ass'n v. FTC*, 526 U.S. 756, 765-68 (1999), and to the FDCPA, see *Heintz v. Jenkins*, 514 U.S. 291, 294, 297-98 (1995).

The "loophole" that the panel describes, App. 28, is the simple fact that this statute, as written, does not cover the petitioners' conduct, because no one can be a "debt collector" under this law who collects a debt for his/her/its own account and not "for another." While the court below may believe that petitioners' collection tactics present the same problems as those against which the FDCPA was directed, that observation cannot serve to bring their business within the reach of a law by which it is not governed. Broadening the statute is a matter for Congress to take up, not the courts.

The methodology of the court of appeals can no more be squared with this Court's guidance than it can with the complete statutory language. No further judicial analysis is called for. For this reason, the Court should grant the petition and reverse the judgment of the Third Circuit.

2. The decision below endorses broad expansions of Federal Trade Commission authority under the FDCPA which are outside, and contrary to, the applicable statutory language.

The decision of the court below endorsed an action of the Federal Trade Commission against the petitioners which exceeded the agency's authority in several ways. This Court's intervention is required to confine the government's exercise of power within its lawful bounds.

(A) The Fair Debt Collection Practices Act grants to the FTC the authority to enforce the FDCPA in very specific ways: it declares a FDCPA violation to be a FTC Act violation as well and gives the Commission authority to use its administrative and other powers under the Federal Trade Commission Act to take action on behalf of victims. 15 U.S.C. § 1692*l*(a). However, the Commission cannot promulgate its own rules on the subject, *id.*(d), and thus cannot define as "unfair or deceptive acts or practices," 15 U.S.C. § 45(a)(1), any debt collection activity which would not already be a violation of the FDCPA. Most important, it grants the FTC no right to sue not otherwise granted by the FTCA:

> For purpose of the exercise by the Commission of its functions and powers under the Federal Trade Commission Act [15 U.S.C. 41 et seq.], a violation of this subchapter shall be deemed an unfair or deceptive act or practice in violation of that Act. All of the functions and powers of the Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with this subchapter, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act, including the power to enforce the provisions of this subchapter in the same manner as if the violation had been a violation of a Federal Trade Commission trade regulation rule.

15 U.S.C. § 1692*l*(a). Concomitantly, the "civil liability" provisions of the FDCPA, 15 U.S.C. § 1692k, authorize individual and class actions, but make no mention of lawsuits by the FTC.

Most of the FTC's powers are those of an administrative agency. It issues complaints, holds hearings, and renders decisions, which may then be reviewed by the Courts of Appeals. 15 U.S.C. § 45(b)-(d). Here, by contrast, the FTC filed a civil lawsuit in the district court in equity, seeking an injunction and monetary "consumer redress." The Commission's authority to sue, however, is limited by law to the seeking of an injunction "pending the issuance of a complaint by the Commission and until . . . the order of the Commission made thereon has become final. . . ." *Id.* § 53(b). That the district court's jurisdiction and authority is only ancillary to a proceeding before the FTC is made apparent by this provision itself, which goes on to say that "if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. . . ." *Id.* Under this language, the instant matter should never have proceeded in the district court.

The courts below apparently accepted an FTC interpretation of its own authority predicated on a misapplication of the succeeding clause: "Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a

permanent injunction." *Id.* § 53(b). This proviso to a proviso could not properly be read so broadly, as here, as to supersede the entire statutory structure of the FTC Act. Nor does anything in the FDCPA, insofar as it authorizes enforcement actions in FDCPA matters by the FTC, invite the FTC to sue in the district court as if it were an aggrieved consumer or pursuing a class action under 15 U.S.C. § 1692k(a). A simple reading of § 1692*l* makes that perfectly plain.

The assumption of jurisdiction by the courts below ignored (*inter alia*) a line of this Court's cases holding that "[t]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional [judicially inferred] remedies." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 93-94 (1981); see also *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701, 732 (1989); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981); *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974). "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines*, 451 U.S. at 97.[3]

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[3] Accord *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985); *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614 (1981) ("The comprehensive character of the procedures outlined . . . precludes the fashioning of an entirely

(Continued on following page)

If Congress wished to allow the FTC to bring civil litigation in the district courts for judicially-fashioned equitable monetary relief in lieu of administrative proceedings under 15 U.S.C. §§ 45(b) and 1692*l*, it would have done so explicitly, not by a proviso to a provision for temporary restraining orders, allowing permanent injunctions to be entered in appropriate cases. Nor would it have provided a detailed mandate authorizing the Commission to sue in district court for a "civil penalty," *see* 15 U.S.C. § 45(m), and left "equitable monetary remedies" unmentioned. Instead, it provided a wholly different set of remedies.

The FTC's second claim against petitioners in this case purportedly arose directly under the Federal Trade Commission Act ("FTCA") itself. As already noted, the Commission is authorized by that Act to sue for an injunction against any "unfair or deceptive acts or practices in or affecting commerce . . ." 15 U.S.C. § 43(a). "[I]n proper cases," the district court may, at the FTC's behest, "issue . . . a permanent injunction." 15 U.S.C. § 53(b). "For purpose of the exercise by [the FTC] of its functions and powers under the [FTCA]," any violation of the FDCPA is "deemed an unfair or deceptive act or practice in violation of [the FTCA]." *Id.* § 1692*l*(a). Moreover, "the functions and powers of the Commission under the Federal Trade Commission Act are available to

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new set of remedies to deal with an aspect of a problem that Congress explicitly addressed.").

the Commission to enforce compliance by any person with [the FDCPA], irrespective of whether the person is engaged in commerce or meets any other jurisdictional tests" in the FTCA. *Id.* But the FTC cannot issue any "trade regulation rules or other regulations with respect to the collection of debts by debt collectors"; the FDCPA itself is the exclusive source of such rules. Thus, the FTC Act cause of action here actually adds nothing of substance to that under the FDCPA itself and cannot contribute to any greater regulation of the petitioners than would be allowable under the more specific law.

(B) In addition to overlooking all of these governing restrictions, the courts below disregarded a statutory limitation on the "functions and powers of the Commission," 15 U.S.C. § 1692*l*(a), invoked by petitioners below – that the FTC may concern itself only with matters risking "substantial injury to consumers" and then only after a cost-benefit analysis. *Id.* § 45(n); *see* Statutes Involved *ante*. This critical provision goes unmentioned in the opinions below.

The FTCA was amended in 1994 to provide:

> The Commission shall have no authority under this section . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not

> outweighed by countervailing benefits to consumers. . . .

15 U.S.C. § 45(n). The Commission never explained in its briefs, nor did the opinions of the courts below, how the petitioners' conduct was found to violate the requirements of this standard.[4]

The opinion of the court of appeals never mentions this governing statutory language on which the petitioners rely. *See* App. 33-34 (502 F.3d at 174-75). The FTC, in its appellate brief, completely disregarded § 45(n) – falsely denying that Commission jurisdiction is limited to consumer matters – and cited only case law predating the pertinent amendment, arguing that their authority extended to unfair practices "in or affecting commerce" regardless of whether they affected "consumers." FTC 3d Cir. Br. 13, 30. The Court should grant certiorari to correct this glaring error and omission.

Petitioners argued below against liability under the FTCA that the individuals they target for check repayment enforcement efforts are not "consumers" in relation to petitioners. The court below responded to this argument by quoting a Ninth Circuit case from 1979, which held that "the deceptive acts or practices

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[4] Nor does the Commission or the panel explain how the FTC could be found to have authority to sue for a judicially imposed injunction against conduct that Congress has forbidden the FTC itself, as an administrative agency, to "declare unlawful."

forbidden by the Act include those used in the collection of debts." App. 33 (502 F.3d at 174); *accord*, App. 13-15 (502 F.3d at 166-67). But that case predated the controlling statutory amendment by 15 years. The court below also points out that the parties filed cross-motions in the district court for summary judgment, and that petitioners would therefore not be heard on appeal to claim that their tactics were not in fact "deceptive." App. 34 (502 F.3d at 175). In offering this response, the court below appears to have misapprehended the petitioners' argument. Our point is not that petitioners' collection practices could not be called "deceptive" or "unfair" as a matter of fact, but rather that the conduct is not within the FTC's enforcement purview as a matter of law.

Whether petitioners' conduct at issue here caused or was likely to cause substantial injury to "consumers," as required, depends upon whom that term covers. It appears to be undefined in the FTCA. *See* 15 U.S.C. § 44 (applicable definitions; "consumer" not included). While the writers of the checks may have been "consumers" within the meaning of the broad definition given in the FDCPA, 15 U.S.C. § 1692a(3) (*see* App. 24-25 [502 F.3d at 171]),[5] the term cannot have the same meaning in the FTCA, since the

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[5] The instant petitioners, however, note that co-defendant Hutchins, in his separately and contemporaneously filed petition for certiorari, argues that one's legal status as a "consumer" is lost if a criminal statute or a statutory presumption of knowledge and intent applies.

FDCPA definition is limited to and focused on the obligation to pay a "debt" as defined in that statute, while the FTCA covers all sorts of "unfair or deceptive" conduct. A "consumer," in the more general or ordinary sense apparently meant by Congress in its 1994 FTCA amendment, would seem to refer to a natural person engaged in a transaction to purchase a product or service and only when dealing with others in that capacity. While the check writers were such when they originally wrote their bad checks, their relationship to Check Investors is not that of a consumer but merely of that of a delinquent obligor on a negotiable instrument.

The district court was not asked to find, and did not find, that the FTC's enforcement action sought to enjoin or penalize any act or practice that was "likely to cause substantial injury to consumers," as required by § 45(n).[6] The court below fails to address the argument that in their relationship to the petitioners, the writers of the dishonored checks were no longer properly classified as "consumers" within the meaning of the FTCA. Accordingly, the Third Circuit's affirmance of the injunction and monetary penalty,

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[6] Even if there were such risk, the court never found that the harm was "not reasonably avoidable by consumers themselves" (either by paying their just debts or by refusing to talk to the petitioners' agents on the telephone). Nor did the district court find that on balance any benefit to be had from penalizing petitioners was "not outweighed by countervailing benefits to consumers" from pressuring delinquent check writers to make good on their obligations, thus helping keep retail prices down.

insofar as the district court's judgment rests on the FTCA, fails to account for the governing statutory standard.

For these reasons as well, this Court should grant a writ of certiorari to address the scope of the Commission's authority under the FTCA in FDCPA cases, since the decisions of the courts below fail to recognize and apply the limitations of the governing statutory language.

3. The opinions below suggest that the lower courts in this case may have overlooked a significant jurisdictional question. This Court should, at the least, summarily vacate and remand the case to address this point.

Petitioners were ordered to pay the FTC, for the benefit of injured consumers – or, if the victims themselves could not be found then for the benefit of the government (*see* note 2 *ante*) – a sum exceeding $10.2 million. As noted above, the FTC chose to bring an original civil action in the district court rather than pursue its own administrative process. Even assuming this was valid at all (*but see* Point 2(A) *ante*), the district court jurisdiction thus invoked is expressly limited to remediation of violations occurring during the past year. "An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court ... within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d) (subsection captioned

"Jurisdiction"). This jurisdictional limitation was completely ignored by the courts below. At the least, then, the instant petition should be granted, the judgment of the court of appeals summarily vacated, and the case remanded for further consideration of the scope of the district court's jurisdiction, with limitation of relief accordingly.

The trial court opinion states that the $10.2 million sum is no more than the cumulative amount that petitioners collected over the ten-year period beginning in 1995 from some 42,100 individuals. App. 43-44 (*Federal Trade Comm'n v. Check Enforcement*, 2005 WL 1677480, *4 (D.N.J., July 18, 2005)). The court of appeals, by contrast, states that this sum is equal to the amount received by petitioners over a *three*-year period beginning in January 2000. App. 7. Putting aside this unexplained but fundamental contradiction, how the district court was authorized to award restitution (or any similar relief) for violations extending back even three years – much less ten – was not explained in light of § 1692k(d).

The suit in this case was filed on May 12, 2003. App. 59. No recovery for any violation occurring prior to May 13, 2002, was therefore cognizable. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. —, 127 S.Ct. 2162 (May 29, 2007) (limitations period for filing of EEOC charges runs from each discrete act of discrimination, thus cutting off award of back pay, notwithstanding continuing pattern of violations). This petition for a writ of certiorari should be granted, the judgment below vacated, and the case

remanded for further consideration of substantial questions raised by this record concerning the extent of the district court's jurisdiction.

CONCLUSION

For the foregoing reasons, petitioners pray that this Court grant their petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming the injunction and monetary relief entered against them.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
STEPHEN ROBERT LACHEEN
ANNE M. DIXON

Attorneys for Petitioners

July 3, 2008.

502 F.3d 159

United States Court of Appeals, Third Circuit.

FEDERAL TRADE COMMISSION

v.

CHECK INVESTORS, INC.; Check Enforcement; Jaredco, Inc.; Barry S. Sussman; Elizabeth [sic] M. Sussman; Charles T. Hutchins. Charles T. Hutchins, Appellant No. 05-3558.

Federal Trade Commission

v.

Check Investors, Inc.; Check Enforcement; Jaredco, Inc.; Barry S. Sussman; Elizabeth [sic] M. Sussman; Charles T. Hutchins. Check Investors, Inc., Check Enforcement, Jaredco, Inc., Barry S. Sussman, Appellants No. [05-]3957.

Nos. 05-3558, 05-3957.

Argued Oct. 4, 2006.
Opinion filed: Sept. 6, 2007.

Charles T. Hutchins, Esq. (Argued), Pro se.

Stephen Robert LaCheen, Esq. (Argued), Anne M. Dixon, Esq., Philadelphia, PA, Attorneys for Appellants, Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., and Barry Sussman.

William Blumenthal, Esq., General Counsel, Federal Trade Commission, John F. Daly, Esq., Deputy General Counsel for Litigation, Federal Trade Commission; Lawrence DeMille-Wagman, Esq. (Argued), Attorney, Federal Trade Commission, Washington, D.C., Attorneys for Appellee.

Before: McKEE, AMBRO, NYGAARD, Circuit Judges.

OPINION

McKEE, Circuit Judge.

Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., Barry Sussman (hereinafter collectively "Check Investors")[1] and Charles T. Hutchins[2] appeal the district court's grant of injunctive relief and $10.2 million in fines in this action that the Federal Trade Commission initiated against them. The FTC claimed that their debt collection practices violated the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 41 *et seq.*, and various provisions of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692 *et seq.* For the reasons that follow, we will affirm.

I. FACTS[3]

Check Investors is in the business of purchasing large numbers of checks written on accounts with insufficient funds ("NSF checks"). The payors of those checks typically wrote them in connection with retail

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[1] Barry Sussman is or was the Vice-President of Check Investors, Inc., and the President of Check Enforcement, Inc., and Jaredco, Inc.

[2] Charles T. Hutchins is or was general counsel to Check Investors, Jaredco and Check Enforcers.

[3] The facts are not in dispute.

transactions and purchases. Check Investors purchased over 2.2 million NSF checks having an estimated face value of approximately $348 million. The checks were purchased from companies such as Telecheck, Inc., Certegy, Inc., and Cross Check, Inc. (collectively "Telecheck").

Telecheck is in the business of guaranteeing checks tendered to pay for consumer transactions. When checks are dishonored, Telecheck pays the merchant/payee the full face value of the check, thereby making the merchant whole. The merchant therefore has no need to attempt to collect the check from the payor/customer. In return for the payment, the merchant assigns all of its rights and benefits to Telecheck, and Telecheck then attempts to collect on the defaulted check to reimburse itself for its payment.

Telecheck first attempts to collect by making three electronic re-presentments of an NSF check to the financial institution the instrument was drawn on. If unsuccessful, Telecheck then sends the payor notices and attempts to contact him/her by telephone. This process may continue for approximately sixty to ninety days. If these efforts fail, Telecheck hires a debt collector, who makes further attempts to collect on the check from the payor. If the debt collector is not able to collect after six months to a year, Telecheck contracts with a second debt collector. Both the first and second debt collectors work on a contingency basis, and, if successful, will receive one-third of the payment received. If the second debt collector is

also unsuccessful, Telecheck sells the rights it acquired from the original merchant to Check Investors, and Check Investors initiates additional collection efforts.

Initially, Check Investors collected NSF checks on behalf of large retail clients. However, by 2002 it was purchasing NSF checks from check guarantee companies such as Telecheck for pennies on the dollar and collecting on its own behalf as part of the process we have just described.

According to the Federal Trade Commission, Check Investors was the brainchild of Barry Sussman. After graduating from law school (and after serving time in prison for attempting to collect debts by posing as an FBI agent), Sussman theorized that if a debt collection business collected only debts it actually owned based on purchasing NSF checks, it would not be subject to the FDCPA, and would therefore be free to use collection techniques prohibited by the FDCPA such as harassment and deception.

In collecting checks, Check Investors routinely added a fee of $125 or $130 to the face amount of each check; an amount that exceeded the legal limit for such fees under the laws of most states. Check Investors would then aggressively dun the defaulting payors without disclosing either the original face amount of the check, or that the amount it was demanding in "satisfaction" of the check included a fee that was higher than permitted under the laws of the applicable state.

Check Investors used both dunning letters and phone calls to collect debts. However, its primary *modus operandi* was to accuse consumers of being criminals or crooks, and threatening them with arrest and criminal or civil prosecution. The collectors it employed were provided with a script that directed them to begin calls by advising consumers that a "criminal complaint recommendation" was pending, and that the consumer would be arrested and prosecuted if he/she did not pay the amount demanded in full. Collectors were allowed to personalize the approach they used, but the approach always focused on threats of prosecution. By way of example, one of Check Investor's collectors left the following message on a consumer's answering machine:

> This message is for the criminal check writer, Stephanie _____. If you think that you could rip these merchants off with your hot checks and hide behind your telephone, I guess you'll just have to explain to the judge why you stole from this merchant, from [name of merchant], with your fraudulent check. At this moment, we do not have any intentions of working this matter out with you voluntarily. You may need to turn yourself in to the local county sheriff's office.

Another consumer was told that if she did not pay, her children would "watch their mother being taken away in handcuffs," and they would "be bringing their mommy care packages in prison."

Check Investors also threatened consumers by sending a form collection letter that purported to be from defendant Hutchins, who as noted, *see* n. 2, *supra*, is an attorney. The letter informed the recipient that Hutchins had been retained by a client who was considering taking criminal or civil action. Hutchins did not actually send the letters or sign them, he had no idea about the number of letters that were sent out purporting to be from him, and he made no inquiry about the status of any of the debts underlying the letters that were sent.[4]

Check Investors' threats of prosecution were made without regard to the amount of the underlying obligation. Employees of Check Investors told one consumer who allegedly wrote an NSF check for $14.70 that she would be "sitting in jail" unless she immediately paid $144.70 (the amount of the original check plus Check Investors' additional fee of $130). Faced with the threat, the consumer paid the full amount demanded.

Check Investors' threats of prosecution were all false. It never notified law enforcement authorities, nor did it take any steps to initiate civil suit against any consumer. Indeed, perhaps because of the small face amount of many of the debts it was collecting,

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[4] Hutchins claims that he established numerous procedures to screen out innocent victims of fraud, identity theft, checks listed in bankruptcy, stop-payment checks and disputed checks to ensure that Check Investors's recovery actions related only to NSF checks.

Hutchins conceded that it would have been a "ridiculous proposition" to file suit.

Check Investors' tactics apparently knew no limits. It routinely contacted family members of obligors. In one case, Check Investors' repeatedly called a 64-year old mother regarding her son's debt; fearing that her son would be arrested and carted off to jail, she paid the amount of the demand. Another technique that Check Investors employed can best be described as "saturation phoning." One consumer stated that Check Investors' collectors called him 17 times in 10 minutes. Collectors also used abusive language, referring to consumers as "deadbeats," "retards," "thieves," and "idiots." The tactics often yielded results. Between January 1, 2000, and January 6, 2003, Check Investor's collection efforts netted $10.2 million from more than 42,000 consumers.

II. DISTRICT COURT PROCEEDINGS

On May 12, 2003, the Federal Trade Commission filed a seven-count complaint in the United States District Court for the District of New Jersey against Check Investors[5] and Hutchins alleging that they had violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and various provisions the FDCPA, in their

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[5] Barry Sussman's wife, Elisabeth Sussman, was also named as a defendant. However, on October 5, 2004, the district court entered a Stipulation and Order settling all claims against her.

attempts to collect from consumers who had written NSF checks. More specifically, the FTC alleged that Check Investors was a "debt collector," collecting "debts", within the meaning of the FDCPA. The complaint further alleged that, in the course of collecting debts, Check Investors had violated, *inter alia,* 15 U.S.C. § 1692d (by using abusive language, and calling consumers repeatedly); § 1692e (by falsely representing that communications came from an attorney, by falsely representing that the consumer would be arrested or imprisoned or had committed a crime, and by falsely threatening legal action); and § 1692f (by adding impermissible charges to the face amounts of the debts it was collecting). The complaint also alleged that many of the acts that violated the FDCPA also violated the FTC Act. The FTC sought to enjoin Check Investors' conduct and obtain restitution for injured consumers, including a refund of the money Check Investors had collected using these techniques.

The district court issued a temporary restraining order enjoining Check Investors from engaging in the conduct alleged in the FTC's complaint, and the court also froze most of Check Investors' assets.[6] On August 14, 2003, the district court entered a preliminary injunction against Check Investors, which continued

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[6] Check Investors did not deny the tactics that FTC alleged. Rather, it insisted that the NSF obligations it was attempting to collect were not subject to the FDCPA or the FTC Act.

the injunctive provisions and the asset freeze of the TRO.

Both parties thereafter filed cross-motions for summary judgment. The district court granted the FTC's motion and denied Check Investors' motion. Check Investors did not dispute that it engaged in any of the conduct alleged in the FTC's complaint, and there was therefore no genuine issue of material fact about its collection tactics. Rather, Check Investors opposed the FTC's motion for summary judgment (and supported its own motion for summary judgment) by arguing that the FDCPA did not apply because it was collecting NSF checks that it had purchased outright from the original payees. According to Check Investors, it was therefore acting as a creditor collecting its own obligations rather than as debt collector collecting obligations owed to a third party.

Check Investors also argued that the payors on the NSF checks it had purchased had violated state laws pertaining to presenting "bad checks" and by committing fraud. Accordingly, in Check Investors view, the payors should be considered criminals or tortfeasers, not consumers, and they were therefore not entitled to the consumer protection of the FDCPA.

The district court rejected these arguments, in part because Check Investors presented no evidence to show that all the payors in question had the intent required for criminal or civil liability when they wrote the checks. The court also held that persons who

write NSF checks are entitled to the FDCPA's protections in any event. The district court thus held that Check Investors was a "debt collector" collecting "debts" within the meaning of the FDCPA, and that it was therefore subject to the prohibitions that Act places on debt collectors' efforts to collect debts. Finally, the court held that Check Investors made material misrepresentations in the course of its collections, and that these misrepresentations also violated the FTC Act.

The district court permanently enjoined Check Investors from engaging in any debt collection activities or selling any of the debts that consumers purportedly owed to it. The court concluded that all defendants were jointly and severally liable to the FTC for restitution in the amount of $10,204,445.00. Thereafter, Hutchins (No. 05-3558), and Check Investors (No. 05-3957) appealed the court's ruling.[7]

III. THE FAIR DEBT COLLECTION PRACTICES ACT

"The FDCPA was enacted in 1977 as an amendment to the Consumer Credit Protection Act 'to protect consumers from a host of unfair, harassing, and deceptive collection practices without imposing unnecessary restrictions on ethical debt collectors.'" *Staub v. Harris*, 626 F.2d 275, 276-77 (3d Cir.1980)

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[7] Check Investors has filed a brief in support of its appeal and has joined in the brief filed by Hutchins.

(quoting Consumer Credit Protection Act, S.Rep. No. 95-382, at 1-2 (1977), reprinted in 1977 U.S.C.C.A.N. 1695, 1696). "The primary goal of the FDCPA is to protect consumers from abusive, deceptive, and unfair debt collection practices, including threats of violence, use of obscene language, certain contacts with acquaintances of the consumer, late night phone calls, and simulated legal process." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1324 (7th Cir.1997) (citation omitted). "A basic tenet of the Act is that all consumers, even those who have mismanaged their financial affairs resulting in default on their debt, deserve the right to be treated in a reasonable and civil manner." *Id.* (citation omitted).

Although Check Investors uses broad strokes to paint all of the payors of its NSF checks as deadbeats, criminals and/or tortfeasors, Congress's findings in enacting the FDCPA are to the contrary. The relevant Senate report noted, *inter alia,* that

> [o]ne of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are "deadbeats." In fact, however, there is universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay debts is minuscule.

S.Rep. No. 93-382, at 2 (1977), reprinted in 1977 U.S.C.C.A.N. at 1696. Rather, Congress recognized that "the vast majority of consumers who obtain

credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness or marital difficulties or divorce." *Id.* Congress also recognized that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." 15 U.S.C. § 1692a. Thus, Congress concluded that "[t]he issue is not one of uncollected debts, but rather whether or not consumers must lose their civil rights and be terrorized and abused by unethical debt collectors." H.R.Rep. No. 95-131, at 3 (1977).

"In the most general terms, the FDCPA prohibits a debt collector from using certain enumerated collection methods . . . to collect a 'debt' from a consumer." *Bass,* 111 F.3d at 1324. The FDCPA prohibits debt collectors from, *inter alia,* engaging in any conduct "the natural consequence of which is to harass, oppress, or abuse any person," 15 U.S.C. § 1692d; from using "any false, deceptive, or misleading representations or means in connection with the collection of any debt," 15 U.S.C. § 1692e; or from using "unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. § 1692f.

Within each broad category of prohibited conduct, the FDCPA includes examples of specific practices that are prohibited. Those prohibited practices could have been modeled on the various tactics Check Investors employed to collect the NSF checks it

purchased. For example, the prohibition on harassing, oppressive or abusive practices precludes a debt collector from using abusive language, 15 U.S.C. § 1692d(2), or from repeatedly calling a consumer, 15 U.S.C. § 1692d(3). The prohibition on false, deceptive or misleading representations precludes a debt collector from falsely representing that a dunning letter was sent by an attorney, 15 U.S.C. § 1692e(3), from falsely representing that nonpayment will result in arrest or imprisonment, 15 U.S.C. § 1692e(4), or that a consumer committed a crime, 15 U.S.C. § 1692e(7). The prohibition on unfair or unconscionable practices precludes a debt collector from adding any charge to the underlying debt unless that charge is authorized by law or the agreement creating the debt. 15 U.S.C. § 1692f(1).

The FDCPA allows consumers to sue an offending creditor for actual damages, attorney's fees and costs, as well as statutory damages up to $1,000. 15 U.S.C. § 1692k(a). The FDCPA also provides the FTC with enforcement authority. 15 U.S.C. § 1692*l*(a).

IV. THE FEDERAL TRADE COMMISSION ACT

Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce." Section 13(b), 15 U.S.C. § 53(b), provides that "in proper cases the Commission may seek, and after proper proof, the [district] court may issue, a permanent injunction."

"The deceptive acts or practices forbidden by the [FTC] Act include those used in the collection of debts." *Trans World Accounts, Inc. v. FTC,* 594 F.2d 212, 214 (9th Cir.1979). Trans World was a debt collection agency that sent out a series of five or six dunning letters, in a format that closely resembled Western Union Telegrams, that threatened immediate legal action against the debtors if payment was not made within a specified period. *Id.* In reality, however, it took Trans World about ninety days from the receipt of the first letter to even consider whether legal action should be taken against any individual debtor. *Id.*

The FTC issued an administrative complaint charging Trans World with the commission of unfair and deceptive practices in violation of Section 5 of the FTC Act. *Id.* The complaint alleged that the letters misrepresented the imminence of legal action, and that they were deceptive in format because they were made to look like Western Union telegrams. *Id.* An administrative law judge entered a decision sustaining the allegations of the complaint, and Trans World appealed to the FTC. *Id.* The FTC adopted, in large measure, the findings and conclusions of the ALJ and entered an order prohibiting the practices used in the collection process. *Id.* On Trans World's petition for review, the Court of Appeals for the Ninth Circuit found, *inter alia,* that there was substantial evidence supporting the finding of deception in the use of the letter format that closely resembled telegrams, which

letters threatened legal action when no action was contemplated. *Id.* at 215.

In *Floersheim v. FTC,* 411 F.2d 874 (9th Cir.1969), the seller of forms used to help creditors collect debts petitioned for review of a cease and desist order of the FTC. The court held that the evidence supported the FTC's finding that the seller's forms, which were mailed from the seller's Washington, D.C., office even though the seller lived in and sold the forms from Los Angeles, California, which repeated the words, "Washington, D.C.," and used an elaborate type style so as to simulate legal documents, were deceptive in exploiting the assumption of many low income debtors that anything that official-looking coming from Washington, D.C., had been sent by the federal government.

V. DISCUSSION

Neither Check Investors nor Hutchins disputes the FTC's claim that they employed harassing and abusive tactics to collect NSF checks or that they collected amounts in excess of the amounts allowed by law. Rather, as noted earlier, they argue that the FDCPA and the FTC Act do not apply to them because they were not collecting "debts," the people who wrote the NSF checks were not "consumers," and they were not "debt collectors," as those terms are defined

in the FDCPA.[8] Each argument is discussed separately below.[9]

A. Are the NSF Checks "Debts" Under the FDCPA?

"A threshold requirement for application of the FDCPA is that the prohibited practices are used in an attempt to collect a 'debt.'" *Zimmerman v. HBO Affiliate Group,* 834 F.2d 1163, 1167 (3d Cir.1987). Congress incorporated a broad definition of both "debt" and "debt collector" into the FDCPA in order to achieve its remedial purpose. 15 U.S.C. §§ 1692a(5), 1692a(6).

The FDCPA defines a "debt" as

> *any* obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject to the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5) (emphasis added).

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[8] These are purely legal questions over which we have plenary review. *Centerpoint Properties v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.),* 268 F.3d 205, 208 (3d Cir.2001).

[9] Check Investors makes its own arguments in its appeal and has adopted the arguments Hutchins makes in his appeal.

Appellants claim that the FDCPA does not apply to them because the NSF checks they purchased were not "debts" within the meaning of the FDCPA. They begin by noting that all 50 states criminalize the act of writing a check knowing that it will be dishonored; and that the law of many states creates a presumption of knowledge and/or willfulness when a check is written on insufficient funds and not paid within a certain period after it has been dishonored, or after the payor receives notice that it has been dishonored. Appellants also stress that since writing a fraudulent check gives rise to tort liability, and since they only attempted to collect NSF checks after a presumption of knowledge or willfulness arose under state law, their NSF checks were not "debts" within the meaning of the FDCPA because they did not arise out of a consumer "transaction." Rather, according to Appellants, their NSF checks arose out of criminal or tortious conduct.[10]

Four Courts of Appeals have rejected this argument. and held that payment with a NSF check creates a "debt" as defined in the FDCPA. *See Bass,* 111 F.3d at 1322; *Duffy v. Landberg,* 133 F.3d 1120 (8th Cir.1998); *Charles v. Lundgren & Assocs.,* 119 F.3d 739 (9th Cir.1997); *Snow v. Riddle,* 143 F.3d 1350 (10th Cir.1998).

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[10] However, Check Investors and Hutchins do not dispute the fact that the obligors they attempted to collect from used the checks in question to obtain "money, property, insurance, or services primarily for personal, family, or household purposes."

The Court of Appeals for the Seventh Circuit was first to reject this argument in *Bass,* and its analysis has been followed by three other courts of appeals. In *Bass,* the court explained:

> [T]he plain language of the Act defines "debt" quite broadly as "any obligation to pay arising out of a [consumer] transaction." In examining this definition, we first focus on the clear and absolute language in the phrase, "any obligation to pay." Such absolute language may not be alternatively read to reference only a limited set of obligations as appellants suggest. As long as the transaction creates an obligation to pay, a debt is created. *We harbor no doubt that a check evidences the drawer's obligation to pay for the purchases made with the check, and should the check be dishonored, the payment obligation remains.*

111 F.3d at 1325 (citations omitted) (emphasis added); *see also Duffy,* 133 F.3d at 1123 ("Since a check written by a consumer in a transaction for goods or services evidences the 'drawer's obligation to pay' and this obligation remains even if the check is dishonored, abusive collection practices related to the dishonored check are prohibited by the FDCPA.") (quoting *Bass,* 111 F.3d at 1325).

Although we have not yet addressed this precise issue, we have held that a transaction's status as a "debt" under the FDCPA must be determined at the time that the obligation first arose. *See Pollice v. National Tax Funding, L.P.,* 225 F.3d 379, 400 (3d

Cir.2000). In *Pollice,* we held that water and sewer obligations constituted a "debt" based on their status when they first arose, and they remained a "debt" after assignment to a collection agency. Thus, our view of a "debt" under the FDCPA is consistent with the four courts of appeals that have held that an NSF check is a "debt."

Nonetheless, Check Investors and Hutchins attempt to circumvent the impact of our analysis in *Pollice* by relying on our earlier decision in *Zimmerman v. HBO Affiliate Group,* 834 F.2d 1163 (3d Cir.1987). In *Zimmerman,* we held that the FDCPA did not apply to attempts by cable television companies to collect money from people who allegedly stole cable television signals by installing illegal antennas. *Id.* at 1167-69. Check Investors and Hutchins now argue that since the payors on its NSF checks were also subject to criminal or tort liability, *Zimmerman* compels the conclusion that the FDCPA does not apply to their collection efforts. We disagree.

In *Zimmerman,* we explained that the FDCPA was enacted to protect people who have "contracted for goods or services and [are] unable to pay for them," and that it was not intended to "protect against a perceived problem with the use of abusive practices in collecting tort settlements from alleged tortfeasors through threats of legal action." *Id.* at 1168. We also explained this in *Pollice,* 225 F.3d at 401 n. 24, by noting: "[c]learly, there was no 'debt' in *Zimmerman* because the obligations arose out of a theft rather than a 'transaction.'"

Check Investors and Hutchins argue that the payors on their NSF checks are similarly situated to the "consumers" who stole cable television signals in *Zimmerman,* and that, like those "consumers," the payors here are not entitled to the protection embodied in the FDCPA because they are criminals and tortfeasors rather than "consumers." They argue that, as in *Zimmerman,* no "debt" was created by executing the NSF checks here because there was no "transaction," as that term is commonly understood and as it is used in the FDCPA.

As the court explained in *Bass* when rejecting identical arguments there:

> Appellants misstate the law when they categorize all dishonored checks as criminal and tortious. Both under the common law of fraud, a specific intent crime, and under most criminal statutes which specifically address dishonored checks, liability attaches only if the drawer either knew or intended that the check be dishonored *at the time the check was drawn.* A bank may refuse payment on a check for a variety of reasons lacking in the necessary fraudulent intent: administrative holds on the account of which the drawer is unaware, bank error, and the drawer's reliance on deposited checks that themselves are dishonored, to name a few. Even when the drawer is at fault for the dishonor, the requisite intent may be absent – for example, when the drawer makes a simple miscalculation or has a subsequent emergency need for funds.

> We recognize that by the time a dishonored check has been turned over to a third party collector, the issuer has typically received notice of dishonor yet has still refused to pay. Nevertheless, an issuer whose intention not to pay the check arises only at some point *after* it is issued has still not, in most jurisdictions, committed a fraudulent or criminal act. The requisite knowledge or intent that the check be dishonored must arise at the time the check is written. We therefore must reject appellants' argument that all dishonored checks are fraudulent and thus not covered by the [FDCPA].

111 F.3d at 1329 (emphasis in original) (footnote omitted).

Moreover, even if some of the payors of NSF checks had engaged in fraud at the time of the transaction, the court held in *Bass* that there is no "fraud exception" in the FDCPA. Given the explicit and unambiguous text of the FDCPA, we agree.

In *Bass*, a debt collector argued that the FDCPA should not apply to debts it was collecting because it was attempting to collect an NSF check that was presumed to be fraudulent under Wisconsin law. 111 F.3d at 1329. The court of appeals rejected that argument because the presumption that the check writer engaged in fraud was rebuttable under Wisconsin law, and because the debt collector had not made the showing required to establish fraudulent intent under state law. *Id.* In rejecting the defendants'

argument, the court commented that, even if the requisite intent had been established, the court would be reluctant to "create a fraud exception where none exists in the [FDCPA's] text." *Id.* at 1329-30. The court explained:

> A review of the legislative history reveals that Congress considered the entire field of defaulting debtors, stating its belief that most debtors fully intended to repay their debts. "Most" is not "all," however, yet Congress still chose not to exempt debt collectors from following the Act if they could prove that the consumer intended his check to be dishonored or accepted credit from a merchant intending default. No section of the Act requires an inquiry into worthiness of the debtor, or purports to protect only "deserving" debtors. To the contrary, Congress has clearly indicated its belief that no consumer deserves to be abused in the collection process. Moreover, we think that such a fraud exception would violate the spirit of the Act. The Act's singular focus is on curbing abusive and deceptive collection practices, not abusive and deceptive consumer payment practices. We are not unaware that in some cases . . . the absence of a fraud exception will allow consumers who intend to pass worthless checks to invoke the protections of the FDCPA. . . . Absent an explicit showing that Congress intended a fraud exception to the Act, the wrong occasioned by debtor fraud is more appropriately redressed under the statutory and common law remedies

> already in place, not by a judicially-created exception that selectively gives a green light to the very abuses proscribed by the Act.

Id. at 1330.

The court thereafter amplified this discussion in *Keele v. Wexler,* 149 F.3d 589 (7th Cir.1998). There, the court explained:

> We touched upon a similar request in *Bass* without formally deciding the issue, but did express at length "our discomfort with the proposition that the courts should create a fraud exception where none exists in the Act's text." Unfortunately for the [debt collector], this "discomfort" has not subsided since *Bass,* and it is time we put to rest any lingering doubts as to the nonexistence of a fraud exception to the FDCPA.

Id. at 595 (citation omitted). The court's analysis continued:

> [T]he FDCPA's legislative history reflects that Congress acknowledged there may be a "number of persons who willfully refuse to pay just debts," but apparently "believe[d] that the serious and widespread abuses" of debt collectors outweighed the necessity to carve out an exception for these so called "deadbeats." If the Act was designed to protect those who willfully refused to pay their debts, it makes little sense why consumers who write checks, knowing they

> will be dishonored, should not enjoy the same protections.

Id. at 596 (citations omitted).

We agree that, given the legislative history of the FDCPA, its structure and text, we could not craft the kind of fraud exception that underlies the arguments of Check Investors without amending the statute.

B. The Payors of the NSF Checks are "Consumers" under the FDCPA.

As noted earlier, "[t]he FDCPA was enacted in 1997 as an amendment to the Consumer Credit Protection Act to protect consumers from a host of unfair, harassing, and deceptive collection practices without imposing unnecessary restrictions on ethical debt collectors." *Staub,* 626 F.2d at 276-77 (citation and internal quotations omitted). Check Investors and Hutchins argue that the payors of the NSF checks are not "consumers" and therefore are not protected by the FDCPA. More specifically, they argue that

> [a]n individual's conduct, when taken as a whole, determines whether he or she qualifies as a consumer for FDCPA purposes. An individual who issues a NSF check or a closed account check, in exchange for money, goods, services or insurance, and who subsequently fails to make restitution within the criminal code statutory period established by the state legislature, is not a FDCPA

> consumer because the individual has not acted like a consumer.

However, the argument ignores that the FTC's cause of action is controlled by the FDCPA. That governing statute defines "consumer" as "*any* natural person obligated or allegedly obligated to pay *any* debt." 15 U.S.C. § 1692a(3) (emphasis added). Even if we accept the claim that these payors are criminals and tortfeasors, those labels would advance neither our inquiry, nor Appellants' position, because "any" is all inclusive and does not exclude criminals or tortfeasors. Rather, it unambiguously includes them. As noted above in our discussion of the analysis in *Bass* and *Keele,* it is clear that Congress realized that some people who write "bad checks" do so knowingly and willfully and that their conduct is fraudulent. It is just as clear that Congress enacted a definition of "consumer" that did not exclude such persons from the protections they would otherwise be afforded under the FDCPA. Yet, Appellants' argument requires that we ignore the phrase: "*any* natural person," that Congress used to define "consumer."

Just as the obligations underlying the NSF checks are "debts" that the payor remains obligated to pay, *see Duffy,* 133 F.3d at 1123 ("[A] check written by a consumer in a transaction for goods or services evidences the "drawer's obligation to pay" and this obligation remains even if the check is dishonored. . . ."), the payors of those checks are "consumers" within the meaning of the FDCPA.

C. Appellants are "Debt Collectors" and not "Creditors" Under the FDCPA.

"The FDCPA's provisions generally apply only to debt collectors." *Pollice,* 225 F.3d at 403 (citation and internal quotations omitted). "Creditors – as opposed to debt collectors – generally are not subject to the FDCPA." *Id.* (citation and internal quotations omitted). A "debt collector" is broadly defined as one who attempts to collect debts "owed or due or asserted to be owed or due another," 15 U.S.C. § 1692a(6). A "creditor" is one who "offers or extends to offer credit creating a debt or to whom a debt is owed." 15 U.S.C. § 1692a(4).

The district court held that Check Investors and Hutchins[11] are "debt collectors" as defined by the FDCPA because Check Investors obtained the "debts," i.e., the NSF checks, after they were in default.[12] It relied on our decision in *Pollice v. National Tax*

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[11] Attorneys who regularly engage in debt collection or debt collection litigation are covered by the FDCPA, and their litigation activities must comply with the requirements of the FDCPA. *Heintz v. Jenkins,* 514 U.S. 291, 292, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995).

[12] Hutchins contends that because a check is an unconditional promise to pay, a check can never be in default. We disagree. "Default" is "the omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." Blacks Law Dictionary 449 (8th ed. 2004). Because the checks Check Investors purchased from Telecheck had already been dishonored, they were in default when purchased. *Holmes v. Telecredit Service Corp.,* 736 F.Supp. 1289, 1293 (D.Del.1990).

Funding, L.P., supra. There, National Tax Funding ("NTF") purchased homeowner's water and sewer obligations from a municipality and sought to collect on those obligations for its own benefit. We held that water and sewer obligations are "debts" within the meaning of the FDCPA. We also held that NTF was a "debt collector" and that the district court should not have dismissed FDCPA claims against it. We explained:

> Courts have indicated that an assignee of an obligation is not a "debt collector" if the obligation is not in default at the time of assignment; conversely, an assignee may be deemed a "debt collector" if the obligation is already in default when it is assigned. . . . Here, there is no dispute that the various claims assigned to NTF were in default prior to their assignment to NTF. Further, there is no question that the "principal purpose" of NTF's business is the "collection of any debts," namely defaulted obligations which it purchases from municipalities.

225 F.3d at 403-404 (citations omitted). This is equally true of Hutchins and Check Investors. Nevertheless, they contend that the district court's holding that they are "debt collectors" was error because they are actually "creditors"[13] collecting debts actually

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[13] The district court held that Check Investors and Hutchins were "debt collectors" as defined in the FDCPA. It did not address their claim that they were "creditors."

owed to them, as opposed to "debt collectors" collecting obligations owed to someone else. The FDCPA defines "creditor" as

> any person who offers or extends credit creating a debt or *to whom a debt is owed,* but such term does not include any person to the extent he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

15 U.S.C. § 1692a(4) (emphasis added). Appellants contend that because Check Investors bought the NSF checks from Telecheck, Check Investors is the actual owner of those checks and is therefore not collecting "debts of another," as a debt collector would. Rather, according to Appellants, Check Investors is actually the entity "to whom a debt is owed." They claim further that because Check Investors is owed the debt, it did not "receive[ ] an assignment or transfer" of the NSF checks "solely for the purpose of" collecting the debt for Telecheck. Thus, Appellants argue that Check Investors satisfies the statutory definition of a "creditor," and, therefore, they are not subject to the provisions of the FDCPA. Although the argument is rather clever, it is wrong. It would elevate form over substance and weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation.

Admittedly, Check Investors appears at first blush to satisfy the statutory definition of a creditor.

As the Court of Appeals for the Seventh Circuit noted in *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir.2003), "for debts that do not originate with the one attempting collection, but are acquired from another, the collection activity related to that debt could logically fall into either category."

However, as to a specific debt, one cannot be both a "creditor" and a "debt collector," as defined in the FDCPA, because those terms are mutually exclusive. As the court explained in *Schlosser,* "[i]f the one who acquired the debt continues to service it, it is acting much like the original creditor that created the debt. On the other hand, if it simply acquires the debt for collection, it is acting more like a debt collector." *Id.* Thus, in determining if one is a "creditor" or a "debt collector," courts have focused on the status of the debt at the time it was acquired. 15 U.S.C. § 1692a controls that inquiry. That provision provides in relevant part:

> (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . . The term does not include –
>
> > (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the

> extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person. . . .

15 U.S.C. § 1692a(6)(F)(iii). In *Pollice,* we relied on this provision of the FDCPA to hold that one attempting to collect a debt is a "debt collector" under the FDCPA if the debt in question was in default when acquired. Conversely, we concluded that § 1692a means that an entity is a creditor if the debt it is attempting to collect was not in default when it was acquired. 225 F.3d at 403-04. Other courts agree. *See Schlosser,* 323 F.3d at 536; *Bailey v. Security Nat'l Servicing Corp.,* 154 F.3d 384, 387 (7th Cir.1998); *Whitaker v. Ameritech Corp.,* 129 F.3d 952, 958 (7th Cir.1997); *Wadlington v. Credit Acceptance Corp.,* 76 F.3d 103, 106-07 (6th Cir.1996); *Perry v. Stewart Title Co.,* 756 F.2d 1197, 1208 (5th Cir.1985).

Admittedly, focusing on the status of the debt when it was acquired overlooks the fact that the person engaging in the collection activity may actually be owed the debt and is, therefore, at least nominally a creditor. Nevertheless, pursuant to § 1692a, Congress has unambiguously directed our focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA. The legislative history explains the wisdom of that provision. The term "debt collector," subject to the exclusions discussed below, was intended to cover all third persons who regularly collect debts. "The primary persons intended to be covered are independent debt collectors." S.Rep. No. 95-382, at 2, 1997

U.S.C.C.A.N. at 1697. The Senate Committee explained that the FDCPA was limited to third-party collectors of past due debts because, unlike creditors, "who generally are restrained by the desire to protect their good will when collecting past due accounts," independent collectors are likely to have "no future contact with the consumer and often are unconcerned with the consumer's opinion of them." *Id.* at 1696.

Thus, as the court explained in *Schlosser*:

> Focusing on the status of the obligation asserted by the assignee is reasonable in light of the conduct regulated by the statute. For those who acquire debts originated by others, the distinction drawn by the statute – whether the loan was in default at the time of the assignment – makes sense as an indication of whether the activity directed at the consumer will be servicing or collection. If the loan is current when it is acquired, the relationship between the assignee and the debtor is, for purposes of regulating communications and collections practices, effectively the same as that between originator and the debtor. If the loan is in default, no ongoing relationship is likely and the only activity will be collection.

323 F.3d at 538.

Here, Check Investors acquired the defaulted checks only for collection purposes. Indeed, it is in business to do just that: acquire seriously defaulted debt, the age of which allows Check Investors to

acquire it for a few pennies on the dollar. The low cost of acquisition allows for substantial profit if the checks are subsequently collected.[14] This is particularly true given the size of the "fees" that Check Investors adds on to each check.

The fact that the NSF checks were purchased and owned outright by Check Investors, rather than Check Investors merely receiving an assignment of the rights of the original payee is therefore irrelevant for purposes of determining whether Check Investors was acting as a debt collector or creditor. Check Investors clearly had no intention of servicing the debt. Check Investors and Hutchins do not dispute the FTC's claim that they employed harassing and abusive tactics to collect the debts they acquired and added "collection fees" that exceeded limitations imposed by state laws. No merchant worried about goodwill or the future of his/her business would have engaged in the kind of conduct that was the daily fare of the collectors at Check Investors. Neither Check Investors nor Hutchinson intended any future contact with the payees of the NSF checks they acquired, and their collection practices reflected as much. The collectors working there resorted to whatever harassment appeared likely to succeed; the only limit

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[14] This is particularly true given the size of the "fees" that Check Investors adds to each check. Their tactics then allow them a remarkable measure of success even though prior debt collection efforts have failed. The result is a very profitable enterprise.

appears to have been a given tactic's likelihood of bearing fruit by yielding a profit. If the future of Appellants' business was in any way dependent upon their goodwill, they would not have dreamed of unleashing their collectors in this manner. Not only do we conclude that Appellants are "debt collectors" rather than "creditors," we believe that their course of conduct exemplifies why Congress enacted the FDCPA and the wisdom of doing so. It also shows why Congress has directed us to focus on whether a debt was in default when acquired to determine the status of "creditor" vs. "debt collector."

D. The Federal Trade Commission Act.

As noted earlier, Hutchins and Check Investors do not dispute the FTC's claim that their collection practices constituted unfair and deceptive practices under the FTC Act. Instead, they argue that the payors of their NSF checks were not "consumers." "[T]he deceptive acts or practices forbidden by the [FTC Act] include those used in the collection of debts." *Trans World Accounts, Inc. v. FTC,* 594 F.2d 212, 214 (9th Cir.1979). Accordingly, we must also reject the argument that the payors of the NSF checks were not "consumers" under the FTC Act.

Nevertheless, Check Investors argues that

> [t]his is not a case where consumers are being solicited to buy time-shares in non-existent condos or swamp land in Florida, and that the district court erred in determining

> that the Check Investors' practices were, in fact, deceptive as to a consumer.

Selling time shares for swamp land in Florida is but one kind of deceptive business practice. The collection techniques involved here are another. Moreover, Check Investors offered nothing in the district court to challenge the FTC's allegations that its collection practices included material misrepresentations in violation of the FTC Act. Accordingly, we will not consider that argument, raised for the first time on appeal, absent a compelling circumstance requiring us to consider it. *Srein v. Frankford Trust Co.*, 323 F.3d 214, 224 n. 8 (3d Cir.2003). Check Investors does not allege the existence of any compelling circumstance, and we can think of none. Thus, we will not consider its argument that the district court erred in finding that its practices were deceptive to a consumer.

VI. CONCLUSION

For all of the above reasons, we will affirm the district court.

2005 WL 1677480

United States District Court, D. New Jersey.
FEDERAL TRADE COMMISSION,
Plaintiff,
v.
CHECK ENFORCEMENT; Jaredco, Inc.;
Barry S. Sussman; Elisabeth M. Sussman;
and Charles T. Hutchins,
Defendants.
No. Civ.A. 03-2115(JWB).

July 18, 2005.

John D. Graubert, Acting General Counsel, Federal Trade Commission, By: Gregory A. Ashe, Seena D. Gressin, Jamie E. Hine, Washington, D.C. and Christopher J. Christie, United States Attorney By: Susan J. Steele, Assistant United States Attorney, Newark, New Jersey, for plaintiff Federal Trade Commission.

Stephen R. LaCheen & Associates, By: Stephen R. LaCheen, Philadelphia, Pennsylvania, for Defendants Check Investors, Inc.; Check Enforcement; Jaredco, Inc.; Barry S. Sussman and Elisabeth M. Sussman.

Charles T. Hutchins, Senior Subcontracts Administrator, USMI/KBRCentral, APO AE, pro se.

OPINION

BISSELL, Chief J.

This matter is before the Court on cross-motions for summary judgment, pursuant to Fed.R.Civ.P. 56(c), by plaintiff Federal Trade Commission and defendant Charles T. Hutchins. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337(a) and 1345, and 15 U.S.C. §§ 45(a), 53(b) and 1692.

FACTS

I. Parties

Plaintiff, the Federal Trade Commission ("FTC"), is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41 *et seq.* The FTC is charged with, *inter alia,* enforcement of Section 5(a) of the Federal Trade Commission Act ("FTCA"), which prohibits unfair and/or deceptive acts or practices affecting commerce, and the Fair Debt Collection practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.,* which prohibits unfair and/or deceptive debt collection practices. The FTC is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTCA and the FDCPA, and to secure such equitable relief as may be appropriate in each case, including consumer redress. 15 U.S.C. §§ 53(b) and 1692(a). (Compl., ¶ 4).

Defendant Check Investors, Inc. ("Check Investors"), d/b/a National Check Control, is a New Jersey

corporation with its principal place of business at 55 Hartz Way, Suite 202, Secaucus, New Jersey. Defendant Check Investors transacts or has transacted business in New Jersey. (*Id.*, ¶ 5).

Defendant Check Enforcement, Inc. ("Check Enforcement"), d/b/a Goldman Check Systems, is a New Jersey corporation with its principal place of business at 55 Hartz Way, Secaucus, New Jersey. Its principal place of business previously was Harmon Cove Tower One, Suite AL-13, Secaucus, New Jersey, and its previous corporate name was "Check Enforcement is Not a Collection Agency, Inc." Defendant Check Enforcement transacts or has transacted business in New Jersey. (*Id.*, ¶ 6).

Defendant Jaredco, Inc. ("Jaredco"), d/b/a Goldman & Co., is a New Jersey corporation. At all times material to the claims in plaintiff's Complaint, Jaredco maintained its principal place of business at Harmon Cove Tower One, Suite AL-13, Secaucus, New Jersey. Defendant Jaredco transacts or has transacted business in New Jersey. (*Id.*, ¶ 7).

Defendant Barry S. Sussman ("Sussman") is or has been Vice President and Director of defendant Check Investors, and the President of defendant Jaredco and Check Enforcement. He resides at 340 Slocum Way, Fort Lee, New Jersey. His principal place of business is now 55 Hartz Way, Suite 202, Secaucus, New Jersey, his principal place of business previously was Harmon Cove Tower One, Suite AL-13, Secaucus, New Jersey. Plaintiff alleges that at all

times material to the claims in the Complaint, acting alone or in concert with others, defendant Sussman formulated, directed, controlled, or participated in the acts and practices of corporate defendants Check Investors, Check Enforcement, and Jaredco, including the acts and practices set forth in plaintiff's Complaint. Defendant Sussman transacts or has transacted business in New Jersey. (*Id.*, ¶ 8).

Defendant Elisabeth Sussman, a/k/a Elisabeth Rabin (Rabin"), is the wife of defendant Sussman and is or has been the Vice President and sole Director of Jaredco. She resides at 340 Slocum Way, Fort Lee, New Jersey. Claims against her in this action have been settled and dismissed. Plaintiff alleged that at all times material to the claims in the complaint, acting alone or in concert with others, defendant Rabin formulated, directed, controlled, or participated in the acts and practices of corporate defendants Check Investors, Check Enforcement, and Jaredco, including the acts and practices set forth in plaintiff's Complaint. Defendant Rabin transacts or has transacted business in New Jersey. (*Id.*, ¶ 9).

Defendant Charles T. Hutchins is an attorney and member of the New Jersey Bar. He resides at 5011 Marshall Road, Farmindale, New Jersey. Defendant Hutchins is or has been general counsel to corporate defendant Check Investors, Check Enforcement, and Jaredco. Plaintiff alleges that defendant Hutchins' principal place of business is 55 Hartz Way, Suite 202, Secaucus, New Jersey. His principal place of business previously was Harmon Cove Tower

One, Suite AL-13, Secaucus, New Jersey. Plaintiff further alleges that at all times material to the claims in the Complaint, acting along or in concert with others, defendant Hutchins formulated, directed, controlled, or participated in the acts and practices of corporate defendants Check Investors, Check Enforcement, and Jaredco, including the acts and practices set forth in Plaintiff's Complaint. Defendant Hutchins transacts or has transacted business in New Jersey. (*Id.* 10).

II. Procedural History

The FTC filed its Complaint on May 12, 2003, alleging that Hutchins and defendants Check Investors, Inc., Check Enforcement, Inc. and Jaredco, Inc. (collectively "NCC") and corporate principal Barry Sussman violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), and Section 5 of the FTC Act by falsely threatening consumers with arrest and criminal and civil prosecution to extract money from them that the consumers did not owe for checks returned by the financial institutions for non-sufficient funds ("NSF checks").

On May 19, 2003, after a hearing with notice to defendants on an order to show cause, this Court entered a temporary restraining order against defendants. Sussman and the corporate defendants subsequently filed opposition to the FTC's application for a preliminary injunction, and Hutchins separately filed his motion to dismiss the Complaint pursuant to

Fed.R.Civ.P. 12(b)(6). On July 30, 2003, the Court issued two opinions, one granting the FTC's motion for a preliminary injunction and the other denying Hutchins' motion to dismiss.

On September 5, 2003, Hutchins filed a counterclaim against the FTC alleging, among other things, that the FTC sought to expand the scope and meaning of the FDCPA beyond Congress' intent. Hutchins, however, withdrew the counterclaim prior to oral argument.

On December 30, 2003, the FTC filed a motion for summary judgment against defendants and Hutchins filed a cross-motion for summary judgment, which was subsequently joined by all other codefendants.

III. Background

The following facts have been set forth in this Court's decision in *Federal Trade Commission v. Check Investors, Inc., et al.*, Civil Action No. 03-2115, slip op. at 6-11 (D.N.J. July 30, 2003) (granting plaintiff's motion for a preliminary injunction).

In its Complaint, plaintiff FTC alleges that the practices defendants employ in attempting to collect payments on NSF checks violate the FDCPA, 15 U.S.C. §§ 1692 *et seq.* (which sets forth a list of unlawful debt collection practices and provides for public enforcement of the FTC) and Section 5 of the Federal Trade Commission Act ("FTCA"), 15 U.S.C.

§ 45 (which prohibits unfair or deceptive acts or practices in or affecting commerce).

Defendants initially operated their enterprise through Jaredco. (Plaintiff's Decl. 31, Exh. 5; Decl. 28, ¶ 21, Exh. 13). In August 2001, Big Lots Stores, Inc., a potential business affiliate, obtained a temporary restraining order against Jaredco, prohibiting it from collecting NSF checks from Big Lots' customers. *See Big Lots Stores, Inc. v. Jaredco, Inc.,* 182 F.Supp.2d 644, 647 (S.D.Ohio 2002). After entry of the temporary restraining order, Sussman abandoned Jaredco and continued operating as Check Enforcement. (Plaintiff's Decl. 31, Exh. 5; Decl. 28, ¶ 21, Exh. 13). Plaintiff alleges that defendants continued to use Jaredco's trade name, Goldman & Co., to make collections. In around January 2002, Sussman abandoned Check Enforcement and continued operations as Check Investors, switching from the Goldman & Co. trade name to National Check Control. (Plaintiff's Decl. 31, Exh. 5; Decl. 28, ¶ 21, Exh. 13). Plaintiff asserts that NCC's collection letters are nearly identical to those used by Goldman Check Systems and Goldman & Co. (Plaintiff's Decl. 14, Exhs. 1, 4; Decl. 16, Exhs. 1, 3). Further, Jaredco, Check Enforcement, and Check Investors have many of the same employees. (Plaintiff's Decl. 31, Exhs. 1, 2, 3; Decl. 28, ¶ 21, Exh. 13).

Defendant Check Investors purchases large amounts of NSF checks that were originally written to various merchants across the country. In particular, Check Investors purchased over 2.2 million

checks, worth an estimated $348 million in face value, from companies like Telecheck, Inc., Certegy, Inc. and Cross Check, Inc. (collectively "Telecheck"). (*See* Hutchins Decl., ¶ 5). Telecheck guarantees checks and, if dishonored, pays to various merchants the amount of each check in full face value of the check so the merchant is relieved, in total from collecting on these checks. In return the merchant assigns all rights, obligations, benefits, and responsibilities to Telecheck for payment. (*Id.* at ¶ 6).

Telecheck attempts to recover on the NSF checks using its own internal methods and, if unsuccessful, will refer these NSF checks to a debt collector. (*Id.*, ¶ 8). Defendants concede that these debt collectors are required to and do follow FDCPA procedures. (*Id.*) After six months to a year, if the debt collector is unsuccessful, Telecheck will send the checks to a second debt collector who also follows FDCPA procedures. (*Id.*) These debt collectors work on a contingency basis and, if successful, receive one-third of the payment. (*Id.*)

If after another six months to a year, Telecheck's debt collectors are still unable to collect on these checks, Telecheck will sell the rights acquired from the original merchants on these NSF checks to defendant Check Investors. (Hutchins Decl., ¶ 10).

Plaintiff FTC alleges that for every purported NSF check, defendants demand immediate payment of a total sum that equals the face value of the NSF check plus an additional fee of either $125.00 or

$130.00, depending on when defendants began collecting on the account. (*See e.g.,* Plaintiff's Decl. 1, ¶ 6; Decl. 2, ¶ 2; Decl. 4, ¶ 8). However, the collection letters do not identify the face value of the NSF check and the additional charge but, rather, merely set forth the total "amount due." (*See e.g.,* Plaintiff's Decl. 1, Exh. 2; Decl. 2, Exh. 2; Decl. 4. Exh. 1). Defendants do not even acknowledge that they are collecting additional charges. (*See, e.g.,* Plaintiff's Decl. 3, ¶ 17; Decl. 8, ¶ 3; Decl. 9, ¶ 6).

To extract full payment, defendants threaten consumers with arrest, criminal prosecution and civil actions. (*See, e.g.,* Plaintiff's Decl. 1, ¶¶ 6, 8; Decl. 3, ¶ 2; Decl. 5, ¶¶ 3, 8, 11). Defendants make these threats through collections letters and abusive and harassing telephone calls to the check writers and their family members. (*See generally,* Plaintiff's Decls. 1-3, 5-17, 19, 21, 23). Plaintiff asserts that, generally, defendants assail consumers for six months or longer to collect the full amount demanded. Consumers who try to assert their rights under the FDCA to dispute or obtain verification of their purported debts are met with further abuse and threats. (*See e.g.,* Plaintiff's Decl. 7, ¶¶ 13, 15; Decl. 2, ¶ 12; Decl. 3, ¶ 11). Plaintiff notes that a number of check writers from whom defendants sought payment did not even owe the underlying NSF check amount claimed by defendants. (Plaintiff's Decl. 1, ¶¶ 2-4; Decl. 2, ¶ 6; Decl. 3, ¶ 6; Decl. 16, ¶ 2).

Plaintiff asserts that since commencing operations in 1995, defendants have collected at least $10.2

million from 42,100 consumers through practices that violate the FDCPA and Section 5 of the FTCA. (Plaintiff's Decl. 28, ¶¶ 10, 12, Exh. 7). Defendants have ignored cease and desist orders issued by at least six states, (Plaintiff's Decl. 27, Exh. 8; Decl. 28, Exhs. 9-12; Decl. 30, Exh. 4), ignored or responded dismissively to law enforcement and regulatory authorities in at least 28 states, (Plaintiff's Decl. 27, ¶¶ 10-16, Exhs. 3-4, 14-41; Decl. 28, Exh. 9 at 2-6, 12-15, 20-21, Exh. 10 at 4; Decl. 30, ¶¶ Exh. 1 at 3-4, Exh. 3 at 2; Decl. 32, ¶ 4), and defaulted on judgments obtained by individual consumers whose suits have alleged abusive collection practices. (Plaintiff's Decl. 33, ¶¶ 4-5, Exh. 2). Defendants are not licensed as a collection agency in any state, yet collect payments in all 50 states, including states that bar collection by unlicensed agencies. (Plaintiff's Decl. 27, ¶ 25, Exhs. 10, 12, 14, 17, 18, 23, 27; Decl. 28, ¶¶ 30-31, Exhs. 9, 11, 12, 20; Decl. 29, Exh. 1 at 1; Decl. 30).

Plaintiff FTC alleges that the above-outlined practices violate numerous provisions of the FDCPA and the FTCA and requests that the Court grant summary judgment and issue a permanent injunction against defendants. Specifically, the FTC seeks a permanent injunction and order that: (1) prohibits defendants from engaging in debt collection activities; (2) prohibits defendants from making certain misrepresentations; (3) requires defendants to pay consumer redress; and (4) enables the FTC to monitor defendants' compliance with a final order. Defendants, however, request that the Court grant their motion

for summary judgment against FTC and deny FTC's motion. In particular, defendants do not deny engaging in the practices described but rather assert that the NSF checks are not debts and that they are not debt collectors under the FDCPA; therefore, they are not subject to its requirements. Regarding plaintiff's FTCA claims, defendants contend that their practices are not deceptive and, therefore, do not violate the FTCA either.

ANALYSIS

I. Standard of Law Applied to Motions for Summary Judgment Pursuant to Fed.R.Civ.P. 56

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Chipollini v. Spencer Gifts, Inc.,* 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed,* 483 U.S. 1052, 108 S.Ct. 26, 97 L.Ed.2d 815 (1987). In deciding a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party and must resolve any reasonable doubt as to the existence of a genuine issue of fact against the moving party. *See Continental Ins. Co. v. Bodie,* 682 F.2d 436, 438 (3d Cir.1982). The moving party has the burden of establishing that there are no genuine

issues of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The Supreme Court has stated that, in applying the criteria for granting summary judgment:

> [t]he judge must ask . . . not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. (*See id.*)[1]

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[1] As noted above, defendants do not contest the factual assertions upon which the FTC predicates its claims. Accordingly there is no genuine issue of material fact that will impede summary judgment here.

II. FTC's and Defendants' Respective Motions for Summary Judgment

Defendant Hutchins has not added any substantive factual evidence to the record and reiterates legal arguments from his previous motion to dismiss. Defendant Hutchins does not deny that he engaged in the above-outlined activity, but rather argues that the bad check writers are not consumers entitled to the protections of the FTCA because:

(1) a dishonored check is not an FDCPA debt;

(2) a dishonored check (for which restitution is not made) is a civil tort (misrepresentation) which is not an FDCPA debt;

(3) a dishonored check (for which restitution is not made) is defined in all fifty states as a crime which is not an FDCPA debt;

(4) a bad check writer (who has not made restitution for an NSF check) is not a consumer;

(5) the issuance of an NSF check, in exchange for receipt of money, insurance, goods or services, is not a transaction as contemplated by the FDCPA;

(6) numerous state statutes provide bad check notification language (similar to Hutchins' demand letters) without FDCPA notices and disclaimers; and

(7) the Third Circuit has held that torts and thefts are not debts under the FDCPA. (Hutchins Mem. at 7-35).

Hutchins acknowledges that this Court held that amounts owed, when individuals issue dishonored checks, are covered under the FDCPA. However, Hutchins now contends that FDCPA protections are lost if individuals failed to make restitution of dishonored checks within the period established by state statutes, and state criminal statutes are violated. Further, Hutchins argues that in such cases "presumptions of knowledge of insufficient funds or that an account is closed attach and/or presumptions that the check writer intended the check not to be paid attach, and/or presumptions that the check writer intended to commit check fraud or theft by deception attach." (Hutchins Mem. at 7). Therefore, Hutchins contends, the FTC must demonstrate that: dishonored checks are not acts of theft or torts analogous to the theft of cable signals; bad check writers are consumers; the checks for which NCC and Hutchins sought restitution were not the product of criminal conduct; the amounts owed were FDCPA debts; and issuance of a dishonored check was an FDCPA transaction.

A. Defendants are "Debt Collectors" Collecting "Debts"

The FDCPA applies only to "debt collectors". *Pollice v. National Tax Funding, L.P.*, 225 F.3d 379, 403 (3d Cir.2000). Whether a defendant is a "debt

collector" as defined by the FDCPA is a question of law appropriate for resolution on summary judgment. (*See id.*) The FDCPA's definition of "debt collector" excludes "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . (iii) concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F). The *Pollice* court concluded that an assignee of a debt is a "debt collector" under the FCDPA if the obligation was already in default when it was assigned. 225 F.3d at 403. This Court noted in its previous decision that "the principal purpose of NCC's business is the collection of defaulted obligations on NSF checks it has acquired." *Check Investors,* Civil Action No. 03-2115, slip op. at 24 (D.N.J. July 29, 2003) (denying defendants' motion to dismiss). The undisputed facts regarding their conduct of business have established that defendants are "debt collectors" as defined by the FDCPA, namely, "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Attorneys who regularly engage in debt collection or debt collection litigation are covered by the FDCPA, and their litigation activities must comply with the requirements of that Act. *Heintz v. Jenkins,* 514 U.S. 291, 292, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995). This Court has previously agreed with several circuit

and district court holdings that "where one obtains goods in return for a dishonored check, a debt is created for the purposes of the FCDPA." *Check Investors,* Civil Action No. 03-2115, slip op. at 20 (D.N.J. July 29, 2003) (denying defendants' motion to dismiss). Defendants have not persuaded the Court that the debts at issue in this case are not covered by the FDCPA.

Rather, defendants contend that the dishonored checks for which they collected or sought to collect payment demonstrate crimes, and the bad check writers marked by defendants were criminals and tortfeasors. (Hutchins Opp. at 4, 7, 10, 13-15). Defendants provide the Court with their own formulated comparison between a consumer and a criminal as allegedly contemplated by the FTCA. (*Id.* at 8-10). However, their conclusions that the check writers are criminals or tortfeasors who enjoy no FTCA protection, is unsupported in fact and law; they erect no bar to summary judgment for the plaintiff.

Relatedly, defendants' argument that the check writers are not consumers and, therefore, not protected by the FDCPA or the FTCA also does not support their motion for summary judgment. Defendants rely on the proposition that the check writers are analogous to counterfeiters or shoplifters who, because they commit theft, are not consumers. In its Complaint, plaintiff alleges that the check writers who NCC contacts are consumers under the FDCPA and the FTCA. The FDCPA defines "consumer" as "any natural person obligated or allegedly obligated

to pay any debt." 15 U.S.C. § 1692a(3). The FTCA does not specifically define "consumer." While case law has made clear that persons who steal or commit fraud to attain goods or services are not consumers, there is simply no evidence before the Court that all the check writers from whom NCC collects payments purposely wrote checks on accounts with insufficient funds or on closed accounts with the intent to steal the merchandise or services they received. Accordingly, defendants' motion for summary judgment as to claims arising under the FDCPA and FTCA must be denied.

Defendants argue that the targeted check writers in this matter were criminals and the FDCPA does not apply to criminal acts. Defendant primarily relies on *Zimmerman v. HBO Affiliate Group,* 834 F.2d 1163 (3d Cir.1987), a case involving cable signal piracy and a demand letter sent to suspected violators by HBO Affiliate Group for a $300.00 settlement. The Third Circuit held that the FDCPA did not apply to attempts to collect money from persons who allegedly had committed cable television theft. *Zimmerman,* 834 F.2d at 1167-68. The *Zimmerman* court indicated that the FDCPA was intended to protect those who have "contracted for goods or services and [are] unable to pay for them," and that the statute was not intended to "protect against a perceived problem with the use of abusive practices in collecting tort settlements from alleged tortfeasors through threats of legal action." (*Id.* at 1168). Thus, the Third Circuit held that there clearly was no debt at issue in *Zimmerman*

because the obligations arose out of theft rather than a "transaction." (*Id.*)

The *Zimmerman* court also stated that a transaction must involve the "offer or extension of credit" to be covered by the FDCPA. (*Id.*) However, in *Pollice v. National Tax Funding,* 225 F.3d 370 (3d Cir.2000), the Third Circuit made clear that the statement regarding the offer or extension of credit was not necessary to the ultimate decision in *Zimmerman.* Indeed, the *Pollice* court held that this statement from *Zimmerman* has been widely disavowed by several other courts of appeals, which have taken the broader view that the FDCPA applies to all obligations to pay money which arise out of consensual consumer transactions, regardless of whether credit has been offered or extended. *Pollice,* 225 F.3d at 401. The *Pollice* court held that the statement in *Zimmerman* was dictum and concluded upon a reexamination of the issue that no offer or extension of credit is required for a debt to be created. (*Id.*) As this is currently the controlling law within this Circuit, *Zimmerman* does not support the proposition that the consumers in this case are criminals precluded from the protection of the FDCPA.

Specifically, defendants argue that the targeted check writers are thieves analogous to those who committed cable piracy in *Zimmerman.* Defendants, however, cannot simply assume that every check writer from whom they seek to collect a debt intended to commit a crime or is similar to persons found liable for shoplifting or cable piracy. When a person shoplifts

or steals cable services, the debt incurred by such person can clearly only be attributed to a criminal act. Check writers, however, may not even know that they had insufficient funds in their accounts at the time of the consumer transaction. Thus, the debts incurred by the check writers may or may not be attributable to criminal acts. Furthermore, whether the check writers engaged in criminal conduct is not a determination for defendants to make. NCC may only attempt to collect payments on checks purchased at a discount. NCC's officers, agents and employees have no authority to determine whether the check writers are criminal and then employ law enforcement tactics to collect the payments.

This Court's previous Opinion stated that defendants "do not have any stature to make the determination that the check writers they contact have committed a crime. Defendants cannot simply declare the check writers to be criminals and except themselves from the constraints of the FDCPA and the FTCA." *Check Investors,* Civil Action No. 03-2115, slip op. at 16 (D.N.J. July 29, 2003) (denying defendants' motion to dismiss). Defendants continue to fail to provide evidence to demonstrate that any consumer from whom they collected payment was convicted of a crime for issuing a dishonored check or was found to be a tortfeasor by a court of competent jurisdiction in a civil case.

As a retort, defendants argue that the FTC carries the burden to prove that the targeted check writers were not criminals. (Hutchins Opp. at 7). In

further support of this assertion defendants argue that the use of the word "consumer" is fatal to Counts Six and Seven of the FTC's Complaint, which allege that defendants' deceptive collection practices violated the FTCA. Defendants cite no law supporting their assertion that the FTC carries the burden to prove that the check writers at issue were not criminals, nor do defendants provide facts sufficient to demonstrate that they were. Therefore, defendants' argument that the FTC must prove that the check writers from whom they collected payment were consumers, not criminals, is without basis in law or fact.

B. Defendants Violated Section 805 of the FDCPA

Defendants have not rebutted evidence that they engaged in prohibited communications with third parties in violation of Section 805 of the FDCPA. The FTC has provided evidence that defendants harassed third parties, including children and parents, to obtain payments for consumers' alleged debts. (FTC's Statement of Material Facts, ¶¶ 34-38). Furthermore, the record indicates that defendants left messages on home answering machines, which were overheard by family members and other third parties, to obtain payments from alleged indebted consumers. (*Id.*) Thus, defendants have failed to place material issues of fact upon the record to contradict that they engaged in prohibited communications with third parties in violation of Section 805 of the FDCPA.

C. Defendants Violated Section 806 of the FDCPA

Defendants have presented no evidence that they did not engage in harassment, oppression and abuse of consumers in violation of Section 806 of the FDCPA. The record demonstrates that defendants used intimidating, demeaning and insulting language towards consumers in attempting to secure payment of purported debts. (*Id.*, ¶¶ 39-42). Because this evidence is unrefuted, there is no issue of material fact precluding a ruling that defendants violated Section 806 of the FDCPA.

D. Defendants Violated Section 807 of the FDCPA

The FTC has demonstrated that defendants made various false, deceptive and misleading representations in order to collect alleged debts from consumers in violation of Section 807 of the FDCPA. In dunning letters, defendants represented to consumers that their alleged debts were greater than the debt owed, adding $125.00 or $130.00 over the value of a consumer's alleged NSF check. (*Id.*, ¶¶ 71-73). Defendants also sent out a mass mailing of collection letters that falsely indicated that the correspondence was from an attorney, in violation of Section 807(10) of the FDCPA. (*Id.*, ¶¶ 46-51). Furthermore, after making threats of arrest and seizure of property or wages in violation of Section 807(4) of the FDCPA, Hutchins' answers to interrogatories and deposition admit that defendants neither filed civil or criminal

complaints with law enforcement agencies nor levied upon a consumer's wages or property. Moreover, defendants violated Section 807(5) of the FDCPA by making false threats to file civil and criminal law suits. For example, regarding civil actions, in some states a foreign corporation not registered to do business in the state is prohibited from bringing suit in the courts of that state. Defendants were not registered in each state where they threatened civil action. As to criminal prosecutions, defendants often made such threats in jurisdictions where such prosecution would already be barred by applicable statutes of limitations. Lastly, defendants regularly claimed that a criminal proceeding against a consumer was imminent unless immediate payment was completed, in violation of Section 807(7). (*Id.*, ¶¶ 68-70). Accordingly, the FTC has established that defendants made various false, deceptive and misleading representations in order to collect alleged debts from consumers in violation of Section 807 of the FDCPA.

E. Defendants Violated Section 808 of the FDCPA

The FTC has demonstrated that defendants regularly collected amounts beyond the amount permitted by law given the face value of consumers' alleged NSF checks. (*Id.*, ¶¶ 71-73). Defendants have not contradicted this evidence, which violates Section 808 of the FDCPA. Hence, there are no material issues of fact in dispute as to whether defendants collected amounts not permitted by law.

F. Defendants Violated Section 809 of the FDCPA

Defendants admit that no FDCPA notices were sent with collection letters. Such a failure violates Section 809 of the FDCPA including the obligation to corroborate debts. (*See id.*, ¶ 75).

G. Defendants Violated Section 5 of the FTCA

The FTC's evidence provides various material misrepresentations, made by defendants, to intimidate consumers into paying debts upon which defendants demanded payment. (*Id.*, ¶¶ 43-73). Defendants have not offered evidence challenging the FTC's record that they made express and false misrepresentations in violation of Section 5 of the FTCA. Accordingly, there are no material issues of fact before the Court as to whether defendants violated Section 5 of the FTCA.

III. The FTC's Proposed Injunction and Monetary Relief

The FTC has established its entitlement to summary judgment against the defendants for numerous statutory violations. In doing so, the FTC has also established the right to the relief which it seeks. The FTC is entitled to both the injunctive and monetary relief which it requests. As to the latter, the FTC has established that $10,204,445.00 in payments were procured by the defendants using the improper purposes addressed in this Opinion. (FTC's Statement of

Material Facts, ¶¶ 76, 77). For the reasons discussed in the FTC's Memorandum in Support of its summary judgment motion, this sum is recoverable from the defendants, jointly and severally, as restitution in this matter. (*See* Plaintiff's Br. at 28-30).

CONCLUSION

For the foregoing reasons, the Court grants the FTC's motion for summary judgment and denies defendants' motion for summary judgment. The Court has adapted the FTC's proposed Final Order for Judgment and Permanent Injunction as to Defendants Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., Barry Sussman and Charles Hutchins, a copy of which is enclosed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

FEDERAL TRADE COMMISSION,	)	
Plaintiff,	)	
v.	)	Civil No. 03-2115 (JWB)
CHECK INVESTORS, INC., *et al.*,	)	
Defendants.	)	

FINAL ORDER FOR JUDGMENT AND PERMANENT INJUNCTION AS TO DEFENDANTS CHECK INVESTORS, INC., CHECK ENFORCEMENT, INC., JAREDCO, INC., BARRY SUSSMAN, AND CHARLES HUTCHINS

The Federal Trade Commission ("FTC") commenced this civil action on May 12, 2003, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and Section 814(a) of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692*l*(a). The FTC seeks both permanent injunctive relief and consumer redress for alleged unfair or deceptive acts or practices by Defendants in connection with the collection of purported debts from consumers. The defendants, as named in the First Amended Complaint for Injunctive and Other Equitable Relief ("Complaint"), are Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., Barry

Sussman, and Charles Hutchins. The Complaint names Elisabeth Sussman as a relief defendant.

This Court has previously entered a stipulated final order for permanent injunction and settlement of claims for monetary relief as to relief defendant Elisabeth Sussman.

The FTC has now moved this Court for summary judgment against defendants Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., Barry Sussman, and Charles Hutchins ("Defendants") pursuant to Federal Rule of Civil Procedure 56. Defendants have cross-moved for summary judgment.

A hearing was held on January 24, 2005. The Court, having considered the arguments, memoranda, and exhibits filed in support of and in opposition to this motion, and all other pleadings and files in this action, as well as the oral arguments of the parties, and now being fully advised in the premises, and for the reasons set forth in this Court's Opinion of even date herewith, hereby grants the FTC's motion for summary judgment and denies the Defendants' cross-motion.

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to issue injunctive and other relief against violations of the FTC Act and, in the exercise of its equitable jurisdiction, to award redress and restitution to remedy the injury to consumers, order disgorgement of profits resulting from Defendants' unlawful acts or practices, and issue other ancillary equitable relief.

This Court is persuaded that the danger of future violations by Defendants justifies the issuance of injunctive relief. Specifically, it is proper in this case to issue a permanent injunction that: (a) prohibits Defendants from engaging in debt collection activities; (b) prohibits Defendants from making, in connection with the collection or attempted collection of any debt, certain misrepresentations; and (c) provides such other ancillary relief as is necessary to assist the FTC and the Court in monitoring Defendants' compliance with such a permanent injunction.

It is proper in this case to enter a monetary judgment against Defendants, jointly and severally, to redress consumer injury resulting from violations of Section 5(a) of the FTC Act and the FDCPA by Defendants. The FTC is entitled to judgment against Defendants, jointly and severally, in the amount of $10,204,445, the net consumer injury caused by them, even though this amount may exceed their unjust enrichment.

This action and the relief awarded herein are in addition to, and not in lieu of, other remedies as may be provided by law, including both civil and criminal remedies. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are binding upon each Defendant; their successors and assigns, and their officers, agents, servants, employees and attorneys, and upon those persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or

otherwise. Entry of this Order is in the public interest.

IT IS, THEREFORE, ON THIS 15th DAY OF JULY, 2005,

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

DEFINITIONS

(1.) For the purposes of this Order, the following definitions shall apply:

A. "Consumer" means any natural person obligated or allegedly obligated to pay any debt.

B. "Creditor" means any person or entity who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person or entity to the extent such person or entity receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt.

C. "Debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment, including, but not limited to, overdue obligations (such as medical bills that were originally payable in full within a certain time

period), dishonored checks that were tendered in payment for goods or services acquired or used primarily for personal, family, or household purposes, and student loans.

D. "Debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. The term does not include (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor; (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts; (C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties; (D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt; (E) any nonprofit organization which, at the

request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction, involving the creditor.

E. "Debt collection activities" means any activities of a debt collector to collect or attempt to collect a debt.

F. "Assisting others" means providing any of the following goods or services to any person or entity: (a) performing customer service functions, including but not limited to receiving or responding to consumer complaints; (b) formulating or providing, or arranging for the formulation or provision of, any telephone sales script or any other written marketing material, including, but not limited to, the text of any Internet website, email or other electronic communication; (c) providing names of, or assisting in the generation of, potential customers; (d) performing marketing services of any kind; and (e) acting as an officer or director of a business entity.

(2.) Defendants are permanently restrained and enjoined from engaging in debt collection activities or assisting others engaged in debt collection activities. Nothing in this Order shall be read as an exception to this Section 2.

(3.) In connection with the collection or attempted collection of any debt, Defendants and any person or entity through which they do business, and their successors, assigns, officers, agents, servants, employees, attorneys, and those other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby permanently restrained and enjoined from:

A. Violating the FDCPA, 15 U.S.C. § 1692 *et seq.*, including but not limited to:

i. Violating Section 805(b) of the FDCPA, 15 U.S.C. § 1692c(b), by communicating with third parties for purposes other than acquiring location information about a consumer, without having obtained directly the prior consent of the consumer or the express permission of a court of competent jurisdiction, and when not reasonably necessary to effectuate a post judgment judicial remedy;

ii. Violating Section 806 of the FDCPA, 15 U.S.C. § 1692d, by engaging in conduct the natural consequence of which is to harass, oppress, or abuse a person, including, but not limited to (a) using obscene or profane language or language the natural consequence of which is to abuse the hearer, in violation of

section 806(2) of the FDCPA, 15 U.S.C. § 1692d(2); and (b) causing a telephone to ring or engaging a person in telephone conversation repeatedly or continuously with the intent to annoy, abuse, or harass a person at the number called, in violation of section 806(5) of the FDCPA, 15 U.S.C. § 1692d(5);

iii. Violating Section 807 of the FDCPA, 15 U.S.C. § 1692e, by using false, deceptive, or misleading representations or means, including, but not limited to (a) falsely representing the character, amount, or legal status of a debt, or any services rendered or compensation which may be lawfully received by a debt collector for collection of a debt, in violation of sections 807(2)(A) and (B) of the FDCPA, 15 U.S.C. §§ 1692e(2)(A) and (B); (b) falsely representing or implying that an individual is an attorney or that a communication is from an attorney, in violation of section 807(3) of the FDCPA, 15 U.S.C. § 1692e(3); (c) falsely representing or implying that nonpayment of a debt will result in the arrest or imprisonment of a person or seizure, garnishment, or attachment of a person's property or wages, when such action is not lawful or when the party has no intention of taking such action, in violation of section 807(4) of the FDCPA, 15 U.S.C. § 1692e(4); (d) threatening to take action that the party does not intend to take, such as filing a lawsuit, in violation of section 807(5) of the FDCPA, 15 U.S.C. § 1692(5); (e) falsely representing or implying that a consumer committed a crime or other conduct in order to disgrace the consumer, in violation of section 807(7), 15 U.S.C.

§ 1692e(7); and (f) using false representations or deceptive means to collect or attempt to collect a debt or to obtain information concerning a consumer, in violation of section 807(10) of the FDCPA, 15 U.S.C. § 1692e(10);

iv. Violating Section 808(1) of the FDCPA, 15 U.S.C. § 1692f(1), by using unfair means to collect or attempt to collect a debt, including but not limited to collecting amounts (including any interest, fee, charge, or expense incidental to the principal obligation) not authorized by the agreement creating the debt or permitted by law; and

v. Violating Section 809(a) of the FDCPA, 15 U.S.C. §1692g(a), by failing to notify consumers of their right to dispute and obtain verification of their debts and to obtain the name of the original creditor, either in the initial communication with consumers by any party, or within five days thereafter;

B. Misrepresenting, directly or by implication, the amount that a consumer owes to satisfy any debt or alleged debt;

C. Misrepresenting, directly or by implication, that any person is an attorney or that such person's communication is from an attorney;

D. Misrepresenting, directly or by implication, that nonpayment of a debt or alleged debt will result in a consumer's arrest or imprisonment, or seizure, garnishment, or attachment of a consumer's property or wages;

E. Misrepresenting, directly or by implication, that any person intends to take legal action against a consumer;

F. Misrepresenting, directly or by implication, that a consumer has committed a crime by issuing a dishonored check;

G. Misrepresenting, directly or by implication, any other fact material to a consumer's decision to pay a debt or alleged debt; and

H. Assisting others who violate any provision of this Section 3.

RESTRICTIONS ON THE SALE OF CONSUMER DEBT ACCOUNTS

4. Defendants and any person or entity through which they do business, and their successors, assigns, officers, agents, servants, employees, attorneys, and all those other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are permanently restrained and enjoined from hereafter selling, renting, leasing, or otherwise transferring accounts or claims arising from debts owed or purportedly owed by consumers to Defendants or their affiliates.

MONETARY RELIEF

5. Judgment is hereby entered against Defendants, jointly and severally, in the amount of TEN MILLION TWO HUNDRED FOUR THOUSAND FOUR HUNDRED FORTY FIVE DOLLARS ($10,204,445, with post-judgment interest at the legal rate, for equitable monetary relief, including but not limited to consumer redress, and for paying any attendant expenses of administering any redress fund. The monetary judgment set forth in this Section 5 is enforceable against any asset owned jointly by, on behalf of, for the benefit of, or in trust by or for, any Defendant, whether held as tenants in common, joint tenants with or without the right of survivorship, tenants by the entirety, and/or community property.

6. Any funds or assets received by the FTC pursuant to this Section 5 above shall be deposited into a fund administered by the FTC or its agent to be used for equitable relief, including but not limited to consumer redress and any attendant expenses for the administration of any redress funds. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the FTC may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the U.S. Treasury as equitable disgorgement. Defendants shall have no

right to challenge the FTC's choice of remedies or the manner of distribution.

7. Defendants shall make available to the FTC all computer files and information in their possession, control, or custody, for each Eligible Consumer, including as available: the Eligible Consumer's name, most recent known address and telephone number; the date and amount of payment made by the Eligible Consumer, the face value of the dishonored check or other debt purportedly owed by the Eligible Consumer, and the date and amount of any refunds, as shown in Defendants' records. For purposes of Section 5 above, "Eligible Consumer" shall mean every consumer who has made a payment to any Defendant.

8. The judgment entered pursuant to Section 5 above is equitable monetary relief, solely remedial in nature, and not a fine, penalty, punitive assessment or forfeiture.

9. Defendants are hereby required, in accordance with 31 U.S.C. § 7701, to furnish to the FTC their tax identification numbers, which shall be used for purposes of collecting and reporting on any delinquent amount arising out of this Order.

TURNOVER OF FROZEN ASSETS

10. In order partially to satisfy the monetary judgment set forth in Section 5 of this Order, any financial or brokerage institution, escrow agent, title company, commodity trading company, business

entity, or person, whether located within the United States or outside the United States, that holds, controls or maintains accounts or assets of, on behalf of, or for the benefit of, any Defendant shall turn over such account or asset to the FTC within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile. In particular:

(a) Bank of New York shall, within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile, transfer to the FTC or its designated agent (i) all assets held in account numbers xxxxxxxxxx, in the name of Check Investors, Inc., xxxxxxxxxx, in the name of Jaredco, xxxxxxxxxx, in the name of Jaredco, xxxxxxxxxx, in the name of Goldman & Co, xxxxxxxxxx, in the name of Check Enforcement, xxxxxxxxxx, in the name of Check Enforcement, and xxxxxxxxxx, in the name of Check Investors, and (ii) 314 $20 gold coins, 55 1 oz. Austrian Philharmonic gold coins, and 65 1 oz. Krugerrand gold coins contained in safe deposit box number xxx-xxxxxxx located at Bank of New York, Branch #250, 1 Harmon Plaza, Secaucus, New Jersey;

(b) Fleet Bank shall, within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile, transfer to the FTC or its designated agent (i) all assets held in account number xxxxxxxxxx, in the name of Check Investors, and (ii) 67 $20 gold coins contained in safe deposit box number A2395-4 located at Fleet Bank,

Branch #93053, 154 Main Street, Fort Lee, New Jersey;

(c) HSBC shall, within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile, transfer to the FTC or its designated agent all assets held in account number xxxxxxxxxx, in the name of Goldmanco;

(d) RBC Dain Rauscher shall, within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile, liquidate all holdings in account number xxxx-xxxx-xxxx, in the name of Goldmanco, and transfer the proceeds of such liquidation to the FTC or its designated agent; and

(e) Wells Fargo Bank shall, within five (5) business days of receiving notice of this Order by any means, including but not limited to via facsimile, transfer to the FTC or its designated agent all assets held in account numbers xxxxxxxxxx, in the name of Check Investors, and xxxxxxxxxx, in the name of Check Investors.

11. In order to partially satisfy the monetary judgment set forth in Section 5 of this Order, Defendants shall, within five (5) business days of the date of entry of this Order, transfer to the FTC or its designated agent (i) 200 $20 gold coins purchased from National Gold Exchange, (ii) 20 1 oz. Austrian Philharmonic gold coins purchased from National Gold Exchange, (iii) one $5 Indian Head gold coin (1911-D MS64) purchased from National Gold Exchange,

(iv) one $10 Liberty Head gold coin (1876-CC MS63) purchased from National Gold Exchange, (v) one $2.5 Liberty Head gold coin (1880 MS66) purchased from National Gold Exchange, (vi) 115 1 oz. Krugerrand gold coins purchased from Kitco, Inc., (vii) ten 1 oz. gold bars purchased from Kitco, Inc., (viii) ten Kilo Nugget (Kangaroo) coins (represented by Perth Mint certificates) purchased from Kitco, Inc., and (ix) one 400 oz. gold bar purchased from Kitco, Inc.

12. In order partially to satisfy the monetary judgment set forth in Section 5 of this Order, each Defendant shall provide an accounting of, and turn over to the FTC, within fifteen (15) business days following the entry of this Order, all assets, real and personal, where ever located within the United States held either: (a) by such Defendant, (b) for such Defendant's benefit, or (c) under such Defendant's direct or indirect control, jointly or singly, including, but not limited to, all assets placed in trust by, for, for the benefit of, on account of, or on behalf of any Defendant.

13. In order partially to satisfy the monetary judgment set forth in Section 5 of this Order, each Defendant shall provide an accounting of, and repatriate and turn over to the FTC, within fifteen (15) business days following the entry of this Order, all assets, real and personal, where ever located in foreign countries held either: (a) by such Defendant, (b) for such Defendant's benefit, or (c) under such Defendant's direct or indirect control, jointly or singly, including, but not limited to, all assets placed in trust

by, for, for the benefit of, on account of, or on behalf of any Defendant.

14. For a period of ten (10) years from the date of entry of this Order, Defendants, in connection with any business where any such defendant is the majority owner or otherwise controls the business, and their agents, employees, officers, corporations, successors, and assigns, and those persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

A. Normal and ordinary accounting records as required by generally accepted accounting standards that reflect profit and loss, assets and liabilities, and the disbursement of revenues;

B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable, to the extent such information is obtained in the ordinary course of business;

C. Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;

D. Complaints and refund requests (whether received directly, indirectly or through any third party) and any responses to those complaints or requests;

E. Copies of all sales scripts, training materials, advertisements, or other marketing materials; and

F. All records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, copies of acknowledgments of receipt of this Order, required by Section 17 of this Order, and all reports submitted to the FTC pursuant to Section 16 of this Order.

15. For the purpose of monitoring and investigating compliance with any provision of this Order,

A. Within ten (10) days of receipt of written notice from a representative of the FTC, Defendants each shall submit additional written reports sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in such defendant's possession or direct or indirect control to inspect the business operation, provided that Defendants, after attempting to resolve a dispute without court action and for good cause shown, may file a motion with the Court seeking an order including one or more of the protections set forth in Federal Rule of Civil Procedure 26(c);

B. In addition, the FTC is authorized to monitor compliance with this Order by all other lawful means, including but not limited to the following:

i. obtaining discovery from any person, without further leave of court, using the procedures prescribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45;

ii. posing as consumers and suppliers to: Defendants, their employees, or any other entity managed or controlled in whole or in part by Defendants, without the necessity of identification or prior notice;

Provided that nothing in this Order shall limit the FTC's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

C. Defendants shall permit representatives of the FTC to interview any employer, consultant, independent contractor, representative, agent, or employee, who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

16. In order that compliance with the provisions of this Order may be monitored:

A. For a period of ten (10) years from the date of entry of this Order,

i. Defendants Barry Sussman and Charles Hutchins each shall notify the FTC of the following:

a. Any changes in his residence, mailing addresses, and telephone numbers, within ten (10) days of the date of such change;

b. Any changes in his employment status (including self-employment) within ten (10) days of the date of such change. Such notice shall include the name and address of each business that he is affiliated with, employed by, creates or forms, or performs services for; a statement of the nature of the business; and a statement of his duties and responsibilities in connection with the business or employment;

c. Any changes in his name or use of any aliases or fictitious names; and

ii. Defendants Check Investors, Inc., Check Enforcement, Inc., Jaredco, Inc., Barry Sussman, and Charles Hutchins, shall notify the FTC of any changes in the corporate structure of defendants Check Investors, Inc., Check Enforcement, Inc., or Jaredco, Inc., or in any business entity that Barry Sussman or Charles Hutchins directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject

to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, *provided* that, with respect to any proposed change in the corporation about which the defendant learns less than thirty (3) days prior to the date such action is to take place, defendant shall notify the FTC as soon as is practicable after obtaining such knowledge.

B. One hundred eighty (180) days after the date of entry of this Order, Defendants each shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to:

i. Any changes required to be reported pursuant to subparagraph (A) above; and

ii. A copy of each acknowledgment of receipt of this Order obtained by defendant pursuant to Section 17;

C. For the purposes of this Order, Defendants shall, unless otherwise directed by the FTC's authorized representatives, mail all written notifications to the FTC to:

Associate Director for Financial Practices
Federal Trade Commission
600 Pennsylvania Avenue, NW, Room NJ-3158
Washington, DC 20580

Re: *FTC v. Check Investors, Inc.*,
Civil No. 03-2115 (JWB) (D.N.J.).

D. For purposes of this Order, the FTC is authorized to communicate directly with Defendants, with contemporaneous notice of any such communication to Defendants' last known counsel of record.

17. For a period of ten (10) years from the date of entry of this Order,

A. Defendants Check Investors, Inc., Check Enforcement, Inc., and Jaredco, Inc. must deliver a copy of this Order to all of their principals, officers, directors, and managers. Defendants Check Investors, Inc., Check Enforcement, Inc., and Jaredco, Inc. also must deliver copies of this Order to all of their employees, agents, and representatives who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within (5) days of service of this Order. For new personnel, delivery shall occur prior to them assuming their responsibilities.

B. For any business that defendant Barry Sussman controls, directly or indirectly, or in which he a majority ownership interest, he shall deliver a copy of this Order to all principals, officers, directors, and managers of that business. Defendant Barry Sussman must also deliver copies of this Order to all employees, agents, and representatives of that business who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within (5) days of service of this Order upon

Defendant Barry Sussman. For new personnel, delivery shall occur prior to them assuming their responsibilities.

C. For any business where Defendant Barry Sussman is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, he must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.

D. For any business that defendant Charles Hutchins controls, directly or indirectly, or in which he a majority ownership interest, he shall deliver a copy of this Order to all principals, officers, directors, and managers of that business. Defendant Charles Hutchins must also deliver copies of this Order to all employees, agents, and representatives of that business who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within (5) days of service of this Order upon Defendant Charles Hutchins. For new personnel, delivery shall occur prior to them assuming their responsibilities.

E. For any business where Defendant Charles Hutchins is not a controlling person of a business but otherwise engages in conduct related to the subject matter of this Order, he must deliver a copy of this Order to all principals and managers of such business before engaging in such conduct.

F. Defendants each must secure a signed and dated statement acknowledging receipt of the Order,

within thirty (30) days of delivery, from all persons receiving a copy of the Order pursuant to this Section 17.

ACKNOWLEDGMENT OF RECEIPT OF ORDER

18. Within five (5) business days after entry of this Order, Defendants each shall submit to the FTC a truthful sworn statement that shall acknowledge receipt of this Order.

RETENTION OF JURISDICTION

19. IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Order.

/s/ John W. Bissell
JOHN W. BISSELL
Chief Judge
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3957

FEDERAL TRADE COMMISSION

v.

CHECK INVESTORS, INC.; CHECK ENFORCEMENT; JAREDCO, INC.; BARRY S. SUSSMAN; ELIZABETH [sic] M. SUSSMAN; CHARLES T. HUTCHINS

Check Investors, Inc., Check Enforcement, Jaredco, Inc., Barry S. Sussman

Appellants

SUR PETITION FOR PANEL REHEARING

BEFORE: McKEE, AMBRO & NYGAARD *Circuit Judges*

The petition for rehearing filed by the Appellants' [sic] in 05-3957 in the above-entitled case, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petition or panel rehearing is hereby **DENIED**.

IT IS SO ORDERED.

By the Court,

/s/ Theodore A. McKee
Circuit Judge

DATED: February 6, 2008

ARL/cc: JFD; LDW; AMD; PG; SRL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-3558

FEDERAL TRADE COMMISSION

v.

CHECK INVESTORS, INC.; CHECK ENFORCEMENT; JAREDCO, INC.; BARRY S. SUSSMAN; ELIZABETH [sic] M. SUSSMAN; CHARLES T. HUTCHINS

Charles T. Hutchins,
Appellant

No. 05-3957

FEDERAL TRADE COMMISSION

v.

CHECK INVESTORS, INC.; CHECK ENFORCEMENT; JAREDCO, INC.; BARRY S. SUSSMAN; ELIZABETH [sic] M. SUSSMAN; CHARLES T. HUTCHINS

Check Investors, Inc., Check Enforcement, Jaredco, Inc., Barry S. Sussman,
Appellants

SUR PETITION FOR REHEARING EN BANC

BEFORE: SCIRICA, *Chief Judge,* SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, JORDAN, HARDIMAN *Circuit Judges* and NYGAARD, *Senior Circuit Judge*

The petitions for rehearing on behalf of Appellants in the above-entitled cases, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the petitions for rehearing en banc are hereby **DENIED**.

IT IS SO ORDERED.

By the Court,

/s/ Theodore A. McKee
Circuit Judge

DATED: February 6, 2008

ARL/cc: JFD; LDW; CTH

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No. 08-37

File Date:
Oct 8 2008

In the Supreme Court of the United States

CHECK INVESTORS, INC., ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DEMILLE-WAGMAN
Assistant General Counsel for Litigation
Federal Trade Commission
Washington, D.C. 20580

GREGORY G. GARRE
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners are "debt collectors" subject to the provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*

2. Whether the Federal Trade Commission acted within its authority by seeking injunctive and monetary relief against petitioners in district court under the FDCPA and the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*

3. Whether the district court acted within its authority by requiring petitioners to disgorge the money they had collected from consumers through the use of abusive and deceptive debt collection practices that violated the FDCPA and the FTC Act.

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In the Supreme Court of the United States

No. 08-37

CHECK INVESTORS, INC., ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 502 F.3d 159. The opinion of the district court (Pet. App. 35-58) is not published in the *Federal Supplement* but is available at 2005 WL 1677480. The final order of the district court (Pet. App. 59-81) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2007. Petitions for rehearing were denied on February 6, 2008 (Pet. App. 82-83, 84-85). On April 24, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including

July 5, 2008. The petition for a writ of certiorari was filed on July 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Check Investors, Inc., Check Enforcement, Inc., and Jaredco, Inc., are entities that are or were engaged in the business of purchasing, and then trying to collect upon, large numbers of checks that had been written by retail customers on accounts containing insufficient funds (NSF checks). Petitioner Barry Sussman is or was a corporate officer of those entities. Charles Hutchins is or was general counsel of the entities. Pet. App. 2-3 & nn.1-2.[1]

a. Petitioners purchased NSF checks from several check guaranty companies after the guaranty companies' attempts to collect on the checks had failed. Typically, the guaranty company had paid the full face value of the check to the merchant who had accepted the check as payment. In exchange, the merchant assigned its rights in the NSF check to the guaranty company. The guaranty company then would attempt to obtain payment on the NSF check from the bank on which the check was drawn or from the consumer who had tendered the check. If those collection efforts were unsuccessful, the guaranty company would hire one or more debt collection agencies to attempt to collect on the check on a contingency-fee basis. If those collection efforts also were unsuccessful, the guaranty company would sell the NSF check to petitioners for a small fraction of its face amount. Petitioners purchased over 2.2

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[1] Hutchins has filed a separate petition for a writ of certiorari arising from the same judgment that is at issue in this case. *Hutchins* v. *FTC*, No. 08-39 (filed July 3, 2008).

million NSF checks with an estimated face value of $348 million. Pet. App. 3-4.

b. Petitioners routinely attempted to collect from the check writer a sum of money that was $125 or $130 more than the face value of the NSF check—in effect, charging a collection fee that exceeded the legal limit under the laws of most states. Petitioners' collection tactics also included aggressive dunning of consumers through letters and telephone calls demanding the full amount allegedly owed without disclosing the face amount of the check or the amount of the additional fee. Petitioners accused consumers of being criminals or "crooks" and falsely threatened consumers with arrest and criminal or civil prosecution if they failed to pay the amount owed. Petitioners also sent form collection letters purporting to be from Hutchins, their general counsel. The letters indicated that Hutchins was considering legal action when, in fact, Hutchins had not investigated the status of the debts at issue. Petitioners employed other harassing collection techniques as well, such as the use of abusive language, contacting consumers' family members about the alleged debts, and "saturation phoning" whereby a consumer would be called repeatedly over a short period of time. Between January 1, 2000, and January 6, 2003, petitioners collected $10.2 million on NSF checks written by more than 42,000 consumers. Pet. App. 4-7.

2. The Federal Trade Co nmission (FTC) filed suit in the United States District Court for the District of New Jersey. The FTC's complaint alleged that the debt-collection practices employed by petitioners and Hutchins violated the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*, and the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.* The

FTC sought injunctive relief and monetary restitution for injured customers. Pet. App. 7-8.

a. The FDCPA applies to "debt collectors" and prohibits a variety of debt collection practices, including harassment or abuse of the consumer (such as the use of obscene language and repeated telephone calls), 15 U.S.C. 1692d; false or misleading representations (including false assertions concerning the character, amount, or legal status of a debt or the consequences of failing to pay a debt), 15 U.S.C. 1692e; and unfair practices (such as collecting fees in excess of those permitted by law), 15 U.S.C. 1692f. Section 5(a) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. 45(a).

b. The parties filed cross-motions for summary judgment. Petitioners and Hutchins did not dispute that they had engaged in the collection practices alleged by the FTC. They asserted, *inter alia*, that the FDCPA did not apply to them because they were "creditors" collecting obligations owed to themselves rather than "debt collectors" collecting obligations owed to a third party. Petitioners and Hutchins also contended that the individuals who had written the NSF checks were criminals or tortfeasors and therefore were not "consumers" entitled to the protections of the FDCPA. Pet. App. 9.

c. The district court granted the FTC's motion for summary judgment and denied petitioners' cross-motion. Pet. App. 35-58. The court held that petitioners were "debt collectors" collecting "debts" as those terms are defined in the FDCPA. *Id.* at 48-54. The court also held that the uncontested evidence demonstrated that petitioners had violated multiple provisions of the FDCPA and Section 5 of the FTC Act. *Id.* at 54-57. The court permanently enjoined petitioners from engaging

in debt-collection activities, violating the FDCPA, and making certain misrepresentations. *Id.* at 65-68. The court also ordered petitioners to pay to the FTC, as restitution for consumer injury, the full amount petitioners had collected through the use of their unlawful practices, a sum that exceeded $10.2 million. *Id.* at 57-58, 69-70.

3. The court of appeals affirmed. Pet. App. 1-34. The court first held that the NSF checks that petitioners had purchased were "debts" under the FDCPA. *Id.* at 16-24. The court noted that the FDCPA defines "debt" broadly to mean "any obligation to pay arising out of a [consumer] transaction." *Id.* at 18 (quoting *Bass* v. *Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1325 (7th Cir. 1997)).[2] Agreeing with the four other courts of appeals that had addressed the issue, the court concluded that a NSF check "evidences the drawer's obligation to pay for the purchases made with the check" and thus is a "debt" under the FDCPA. *Id.* at 18-19 (emphasis omitted) (quoting *Bass*, 111 F.3d at 1325).

The court of appeals also rejected petitioners' argument that NSF checks are not "debts" because they arise out of criminal or tortious conduct, rather than out of a consumer transaction. Pet. App. 19-24. The court noted that under the common law of fraud and under most criminal statutes, a NSF check cannot be the basis for tort or criminal liability unless the drawer "either knew or intended that the check be dishonored *at the*

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[2] The full definition of "debt" for purposes of the FDCPA is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. 1692a(5).

time the check was drawn." *Id.* at 20 (quoting *Bass*, 111 F.3d at 1329). Because a bank can refuse payment on a check for many reasons, and because the drawer of a dishonored check may not have a criminal or fraudulent intent at the time the check was drawn, the court rejected the "argument that all dishonored checks are fraudulent and thus not covered by the [FDCPA]." *Id.* at 20-21 (brackets in original) (quoting *Bass*, 111 F.3d at 1329). The court also concluded that the "explicit and unambiguous text of the FDCPA" demonstrated that it contains no "fraud exception," a conclusion reinforced by the legislative history. *Id.* at 21-24. The court noted that "[n]o section of the [FDCPA] requires an inquiry into [the] worthiness of the debtor, or purports to protect only 'deserving' debtors," and that the "singular focus [of the FDCPA] is on curbing abusive and deceptive collection practices, not abusive and deceptive consumer payment practices." *Id.* at 22 (quoting *Bass*, 111 F.3d at 1330).

The court of appeals also rejected petitioners' claim that the payors of NSF checks are not "consumers" entitled to the protections of the FDCPA. Pet. App. 24-25. The court noted that the FDCPA defines "consumer" as "*any* natural person obligated or allegedly obligated to pay *any* debt." *Id.* at 25 (emphasis in original) (quoting 15 U.S.C. 1692a(3)). Having already determined that NSF checks are "debts" under the FDCPA, the court concluded that the "all inclusive" statutory definition "unambiguously" encompassed the payors of NSF checks. *Ibid.*

The court of appeals further held that petitioners are "debt collectors" rather than "creditors" under the FDCPA. Pet. App. 26-33. The court recited the applicable statutory definition of the term "creditor":

> [A]ny person who offers or extends credit creating a debt or *to whom a debt is owed*, but such term does not include any person to the extent [that] he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

Id. at 28 (emphasis in original) (quoting 15 U.S.C. 1692a(4)). The court rejected petitioners' argument that because they had *purchased* the NSF checks from the guaranty companies, they were creditors "to whom a debt [was] owed" and not debt collectors collecting debts owed to another. *Ibid.* The court observed that petitioners' interpretation of the statute "would elevate form over substance and weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation." *Ibid.*

The court of appeals also noted that the FDCPA's definition of the term "debt collector" excludes persons collecting debt due to another to the extent that such activity "concern[ed] a debt which was not in default at the time it was obtained by such person." Pet. App. 29-30 (quoting 15 U.S.C. 1692a(6)(F)(iii)).[3] The court con-

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[3] The FDCPA defines the term "debt collector" to mean "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). The statutory definition contains several exclusions. The exclusion identified by the court of appeals applies to "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity * * * concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a(6)(F)(iii).

cluded that, through the definition of "debt collector," "Congress ha[d] unambiguously directed [the court's] focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA." *Id.* at 30. The court also relied on legislative history confirming that Congress's focus in the FDCPA was on "third-party collectors of past due debts" who, unlike creditors, would not be constrained in their collection tactics by the desire to maintain good will with the consumer. *Id.* at 30-31. Applying those principles to the facts of this case, the court held that petitioners were "debt collectors" subject to the FDCPA because they "acquired the defaulted checks only for collection purposes." *Id.* at 31. The court also observed that petitioners' "course of conduct exemplifies why Congress enacted the FDCPA and the wisdom of doing so." *Id.* at 33.

The court of appeals held that petitioners' conduct was prohibited by the FTC Act as well. Pet. App. 33-34. The court explained that the FTC Act prohibits deceptive acts or practices employed in the collection of debts, *id.* at 33 (citing *Trans World Accounts, Inc.* v. *FTC*, 594 F.2d 212, 214 (9th Cir. 1979)), and that the payors of the NSF checks were therefore "consumer[s]" within the meaning of the FTC Act. *Ibid.* The court further concluded that the debt collection techniques utilized by petitioners constituted a "deceptive business practice" within the meaning of the FTC Act. *Id.* at 34.

ARGUMENT

Petitioners concede (Pet. 14) that they "engaged in aggressive methods and tactics which are prohibited by federal law when engaged in by professional debt collectors." They contend, however, that the court of appeals

erred by finding that they are "debt collectors" subject to the FDCPA. Petitioners also raise challenges to the FTC's authority to seek injunctive and equitable relief in this case, as well as to the district court's authority to order disgorgement of all the proceeds that petitioners obtained through their illegal debt-collection methods.

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. In addition, petitioners' challenges to the authority of the FTC and the district court are not properly before the Court and are without merit. Further review is not warranted.

1. Petitioners contend (Pet. 14-19) that they are not "debt collectors" subject to the restrictions of the FDCPA. The court of appeals correctly rejected that contention, and its interpretation of the relevant statutory provisions is consistent with the decisions of other courts of appeals as well as with the statute's text and legislative history.

The FDCPA provides alternative definitions of the term "debt collector," one of which is "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts[.]" 15 U.S.C. 1692a(6); see note 3, *supra*. Petitioners did not dispute in the lower courts that they used instrumentalities of interstate commerce in their business (*e.g.*, the mail and telephones), nor did they dispute that the "principal purpose" of their business was to collect the amounts due on NSF checks. Gov't C.A. Br. 23. Petitioners also do not challenge the court of appeals' holding that NSF checks constitute "debts" under the FDCPA. Petitioners therefore fell squarely within the statutory definition of "debt collector."

Petitioners respond (Pet. 16-19) that they qualify for the "creditor" exception to the definition of "debt collector." See 15 U.S.C. 1692a(6)(A) (excluding from term "debt collector" any officer or employee of a "creditor" while collecting debts for the creditor in the name of the creditor). The FDCPA defines the term "creditor" to include "any person * * * to whom a debt is owed," but *excludes* from that category any person who "receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. 1692a(4); see p. 7, *supra*. Petitioners "accept[ ] for purposes of argument" (Pet. 16-17) that they received an "assignment" of the NSF checks after the checks were in default. Petitioners contend (Pet. 17) that they are "creditors" nonetheless because their "purpose" was to collect the debts *for themselves* and not "for another." The court of appeals correctly rejected that argument.

The "assignment" exception to the FDCPA's definition of creditor is unclear, because an "assignment" of a debt generally will result in a transfer of all rights in the debt, meaning that "any collection of [the] debt by the assignee would generally be for itself." *Kimber* v. *Federal Fin. Corp.*, 668 F. Supp. 1480, 1485 (M.D. Ala. 1987). The "assignment" exception nonetheless "refers to the assignee's collection as being for another." *Ibid.* Ambiguity also arises from the clause that precedes the "assignment" exception, which defines "creditor" to include only "those who originate a debt or to whom a debt is owed," *i.e.*, persons who collect debts *for themselves*. Interpreting the "assignment" exception to cover only those who collect debts *for another* would "render the exception superfluous and meaningless" because "those who collect debts for others are not in the original defi-

nitional universe, and there is therefore no need to exclude them." *Ibid.*

To resolve the ambiguities presented by the "for another" phrase in the "assignment" exception, the court of appeals correctly considered the broader statutory context and the legislative history of the FDCPA . See, *e.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006) (interpretation of a word or phrase in a statute "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis"). The court recognized that petitioners' interpretation of the phrase "for another" would "weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation." Pet. App. 28.

First, petitioners' interpretation would create conflicts with other provisions of the statutory scheme that address third parties who collect debts that originally were due to another—such as the definition of "debt collector"—in which Congress "unambiguously directed [courts to] focus [on] the time the debt was acquired [*i.e.*, whether the debt was already in default at the time of the acquisition] in determining whether one is acting as a creditor or debt collector under the FDCPA." Pet. App. 30. Second, petitioners' interpretation would frustrate Congress's intent to include within the category of "debt collector" third persons who regularly collect debts, on the theory that those independent debt collectors likely will have "no future contact with the consumer" and, as a result, their debt-collection tactics will not be "restrained by the desire to protect their good will when collecting past due accounts." *Id.* at 30-31 (quoting *Fair Debt Collection Practices Act*, S. Rep. No.

382, 95th Cong., 1st Sess. 2 (1977)). In light of the statutory context and the legislative history, the phrase "for another" in the "assignment" exception is best understood to mean "that the debts should have *originally* belonged to another and that the creditor was therefore in effect a third-party or independent creditor" who would be subject to the consumer-protection provisions of the FDCPA. *Kimber*, 668 F. Supp. at 1485.

Petitioners demonstrate no error in the court of appeals' statutory analysis, nor is there a conflict between the court's decision and a decision of this Court or any other court of appeals. Indeed, the other courts of appeals to have addressed the issue agree that the statutory distinction between a "creditor" and a "debt collector" depends, in the case of a third party to whom a debt has been transferred or assigned, solely upon whether the debt in question was in default at the time of the transfer or assignment. Pet. App. 30 (citing, *inter alia*, *Schlosser* v. *Fairbanks Capital Corp.*, 323 F.3d 534, 536 (7th Cir. 2003); *Wadlington* v. *Credit Acceptance Corp.*, 76 F.3d 103, 106-107 (6th Cir. 1996); *Perry* v. *Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985)).[4] Because petitioners acquired the NSF checks when those debts

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[4] Petitioners imply (Pet. 18) that the court of appeals' decision conflicts with *Wadlington*. That is incorrect. In *Wadlington*, it was "uncontested" that the FDCPA defendant had been assigned the debts at issue *before* they were in default. 76 F.3d at 104. The Sixth Circuit held that, as a result, the defendant was a "creditor" and not a "debt collector" for purposes of the FDCPA. *Id.* at 106-107. The courts in this case and in *Wadlington* thus applied the same interpretation of the terms "creditor" and "debt collector" under the FDCPA. The results of the two analyses differed because the *facts* of each case were different on the crucial question of whether the debts at issue were in default at the time they were assigned to the third-party collector.

were in default, the court correctly held that petitioners were "debt collectors" for purposes of the FDCPA.

2. Petitioners contend (Pet. 19-24) that the FTC acted outside its authority by pursuing relief for violations of the FDCPA in the district court without also initiating an administrative proceeding. Petitioners failed to raise that argument in the lower courts. Accordingly, the argument is not properly before the Court and should be rejected on that basis alone. *Travelers Cas. & Sur. Co.* v. *Pacific Gas & Elec. Co.*, 127 S. Ct. 1199, 1207 (2007) (Court ordinarily does not consider claims that were neither raised nor addressed below).

Petitioners' argument also lacks merit. The FDCPA provides that the FTC may use "[a]ll of the functions and powers" available to it under the FTC Act to enforce the FDCPA. 15 U.S.C. 1692*l*(a). It is well settled that, pursuant to 15 U.S.C. 53(b), the FTC may initiate an action in federal district court seeking a permanent injunction and other equitable relief, including disgorgement, to enforce the FTC Act. *FTC* v. *Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994), cert. denied, 514 U.S. 1083 (1995); *FTC* v. *Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC* v. *U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-1434 (11th Cir. 1984). Further, the FTC may use Section 13(b) of the FTC Act to obtain injunctive relief with respect to any other law that it enforces. *FTC* v. *Evans Prods. Co.*, 775 F.2d 1084, 1086 (9th Cir. 1985); *FTC* v. *Medical Billers Network, Inc.*, 543 F. Supp. 2d 283, 323 (S.D.N.Y. 2008). Congress recognized and expanded that authority when it enacted the Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 10(a)(2), 108 Stat. 1695; see S. Rep. No. 130, 103d Cong., 1st Sess. 16 (1993) ("[t]he FTC has used its section [13(b)]

injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts"). Because the FTC may use any authority available to it under the FTC Act to enforce the FDCPA, it acted within its authority under Section 13(b) by seeking injunctive and monetary relief against petitioners in district court.

Petitioners separately contend (Pet. 24-28) that the FTC acted outside its authority under 15 U.S.C. 45(n). The court of appeals did not address that claim, which petitioners first raised in their reply brief in that court. See *In re Surrick*, 338 F.3d 224, 237 (3d Cir. 2003) (failure to identify or argue issue in opening brief constitutes waiver of argument on appeal), cert. denied, 540 U.S. 1219 (2004). Accordingly, the claim is not properly before this Court.

Petitioners' claim also lacks merit because 15 U.S.C. 45(n) is not implicated in this case. Section 5(n) of the FTC Act sets forth the standard of proof the FTC must satisfy in order to declare a practice "unfair" under 15 U.S.C. 45(a). The FTC did not allege that any of petitioners' acts or practices was "unfair" under the FTC Act, but instead asserted that petitioners' conduct violated Section 5(a) because it was *deceptive*. The standard of proof at 15 U.S.C. 45(n) does not apply when the FTC challenges conduct as "deceptive" under the FTC Act. Petitioners' claim is thus without merit.

3. Petitioners contend (Pet. 28-30) that the one-year statute of limitations set forth at 15 U.S.C. 1692k(d) limits the restitution the district court was authorized to order to the amount that petitioners unlawfully collected during the year that preceded the FTC complaint. Because petitioners failed to raise that argument in the

lower courts, it is not properly before this Court. Although petitioners describe (Pet. 28-29) the limitations period as a restriction on the "jurisdiction" of the district court, they offer no basis for departing from the general rule that statutes of limitations are waivable and non-jurisdictional. See, *e.g.*, *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 753 (2008) ("[T]he law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver.").

In any event, petitioners' argument lacks merit. The statute of limitations on which petitioners rely is a subsection of the FDCPA provision that establishes a *private* right of action by a person or a class of persons damaged by the unlawful practices of a debt collector. See 15 U.S.C. 1692k(a). There is no corresponding statute of limitations in the provision that authorizes the FTC to enforce the FDCPA, 15 U.S.C. 1692*l*. Reinforcing the conclusion that Section 1692k has no application here, the one-year limitation period on which petitioners rely applies to actions "to enforce any *liability*." 15 U.S.C. 1692k(d) (emphasis added). Actions brought by the FTC (or by other agencies authorized to enforce the FDCPA, 15 U.S.C. 1692*l*(b)) seek to secure equitable and other relief against a law violator, not to "enforce" a "liability." Thus, the one-year statute of limitations does not apply in this case and did not restrict the restitution the district court could properly order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE
Solicitor General

WILLIAM BLUMENTHAL
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

LAWRENCE DEMILLE-WAGMAN
Assistant General Counsel for Litigation
Federal Trade Commission

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